Supreme Court, U.S.
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In the
Supreme Court of the United States

Sprint Communications Company, L.P.
Petitioner,

v.

Director of Revenue, State of Missouri
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Missouri's sales tax refund procedure, as interpreted by the Missouri Supreme Court, provide taxpayers their Due Process rights to a fair and meaningful opportunity to contest a tax and a clear and certain remedy as required by *McKesson* and *Reich*?

2. Does the Cases and Controversies Clause of the United States Constitution require Missouri to allow "the real party in interest" standing to pursue judicial redress in state courts?

3. To what extent can Missouri provide similarly situated taxpayers with differing refund remedies and still comply with the Equal Protection Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The parties are as stated in the caption.

RULE 29.6 STATEMENT

The following companies hold a direct or indirect ownership interest in Sprint Communications Company, L.P.:

Sprint Corporation
UCOM, Inc.
US Telecom, Inc.
Utelcom, Inc.
Sprint International, Inc.

Sprint Communications Company, L.P. has the following subsidiaries that are not wholly owned:

Call-Net Enterprises, Inc.
United Telephone Company of Kansas

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PETITION FOR WRIT OF CERTIORARI

Sprint Communications Company, L.P. respectfully petitions for a writ of certiorari to review the judgement of the Missouri Supreme Court in this case.

OPINIONS BELOW

The decision of the Missouri Supreme Court is reported at 64 S.W.3d 832 (Mo. banc 2002), and is reprinted in Appendix A. The actual order denying rehearing, which is not officially reported, is reprinted in Appendix B. The opinion of the Missouri Administrative Hearing Commission is unreported and has been reprinted in Appendix C.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on January 22, 2002. The motion for rehearing was timely filed on February 5, 2002 and denied on February 7, 2002. The judgment and order are reprinted in Appendix A and B. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

U.S. Const., Article III, Section 2
U.S. Const. Amend. V
U.S. Const. Amend. XIV
Missouri Const., Article I, Section 10
Mo. Rev. Stat. § 144.190
Mo. Rev. Stat. § 144.700

The text of these provisions and related sections of the Missouri Sales and Use Tax act are reproduced in Appendix D & E at 21a - 35a.

STATEMENT

In *IBM v. Director of Revenue*, 958 S.W.2d 554 (Mo. banc 1997), the Missouri Supreme Court ruled for the first time that service providers could qualify to purchase machinery and equipment exempt from Missouri sales[1] tax under the Missouri manufacturing exemption. Following the *IBM* decision, Petitioner identified that it paid sales tax to 831 different vendors on purchases that potentially qualify for refund.

The Missouri sales tax refund procedure

The Missouri sales tax refund procedure is set forth in Mo.Rev.Stat. §144.190.. The Missouri Supreme Court confirmed this in *Norwin G. Heimos Greenhouse, Inc., v. Director of Revenue*, 724 S.W.2d 505, 506 (Mo. banc 1987), when they stated that "Section 144.190 provides the exclusive remedy for recovery of sales tax."[2] Section 144.190 identifies that if any tax has been erroneously or illegally collected it can be refunded to the person legally obligated to remit the tax if a refund claim is filed within three (3) years of the date of overpayment. (Appendix E, 27a - 28a)

Missouri imposes a tax payment obligation on Petitioner and a tax collection obligation on Petitioner's vendor. Mo.Rev.Stat. §144.060 requires every person making a purchase of taxable property or services pay the tax or be guilty of a misdemeanor. Mo.Rev.Stat. §144.080(5) sets forth a vendor's collection duty and makes it unlawful for a vendor to absorb the tax. (Appendix E, 25a - 27a)

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[1] All references to sales tax include the Missouri sales tax imposed by Mo. Rev. Stat. § 144.021 and the Missouri vendor's use tax imposed by Mo. Rev. Stat. § 144.610.

[2] See Also, *Galamet, Inc. v. Director of Revenue*, 915 S.W.2d 331, 336 (Mo. banc 1996), where the Missouri Supreme Court stated "Refunds of sales tax are governed by § 144.190, RSMo."

In *Galamet, Inc. v. Director of Revenue,* 915 S.W.2d 331 (Mo. banc 1996), the Missouri Supreme Court ruled that the taxpayer's vendor, not the taxpayer, is the person legally obligated to remit the tax and has standing to file a sales tax refund under §144.190. The court's opinion in *Galamet* was based on their analysis of the Missouri legislature's intent when the legislature modified §144.190 in 1988.

The legislature's 1988 amendment of §144.190 resulted from the Missouri Supreme Court's decision in *Heimos Greenhouse.* At the time of the *Heimos Greenhouse* decision, §144.190 allowed erroneously or illegally collected tax amounts to be credited to the "person" from whom they were due. While Respondent's regulation identified that "the seller whose sales tax account has been credited the sales tax is the person who is to request a refund or credit," Mo.Code Regs. §10-3.520 (Repealed eff. 10-30-2000) (Appendix E, 29a), the court found that "person" referred to anyone burdened, either legally or otherwise. Based on this determination, the court held that, "as an economically burdened entity, the purchaser is a 'person' with a right to request a refund pursuant to §144.190." *Heimos Greenhouse* at 507. Following this decision, the legislature amended §144.190 by replacing the term "person" with "the person legally obligated to remit the tax." The Missouri Supreme Court in *Galamet* felt that this amendment demonstrated the legislature's intent that only sellers can file sales tax refunds. The legislature's amendment made the Missouri law consistent with Respondent's previously drafted regulations.

The facts in this case

Petitioner decided to pursue a Missouri sales tax refund of all tax paid on machinery and equipment that presumably qualified for the Missouri manufacturing exemption. Following the Missouri Supreme Court's ruling in *IBM*, Petitioner began its quest to persuade vendors to file refund claims on Petitioner's behalf. Due to the

administrative difficulties and time involved with locating the appropriate personnel for 831 vendors, Petitioner narrowed the list and decided to pursue refunds from 105 vendors. Petitioner contacted the vendors, followed-up with letters and partially completed refund applications, and re-contacted vendors several times over the next 18 months. Having failed to persuade several of the vendors to file refund claims with Respondent, Petitioner filed refunds directly with Respondent for the six (6) most important vendors. Respondent declined to process these refunds since they were not filed by Petitioner's vendors nor accompanied by a vendor power of attorney.

Petitioner appealed the denial to the Missouri Administrative Hearing Commission (Commission) asserting that Respondent's application of §144.190 violates the Due Process and Equal Protection Clauses of the United States and Missouri Constitutions. Respondent filed a Motion for Summary Determination stating that the Commission lacked jurisdiction because Petitioner did not have standing to file the refund claims on its own behalf. The Commission granted Respondent's motion citing the Missouri Supreme Court's ruling in *Galamet* as the basis for finding that Petitioner lacked standing to file the refund claim on its own behalf. The Commission did not render an opinion as to whether §144.190 and its application are unconstitutional because it did not have authority to rule on Constitutional issues. (Appendix C, 7a - 20a)

Petitioner timely appealed the Commission's determination directly to the Missouri Supreme Court. Petitioner again asserted that Respondent's actions violated the Due Process and Equal Protection Clauses of the United States and Missouri Constitutions and the Case and Controversy Clause of the United States Constitution. On January 22, 2002, the Missouri Supreme Court affirmed the Commission's determination. (Appendix A, 1a - 5a) Petitioner timely filed a motion for rehearing on February 5,

2002 which was denied on February 7, 2002. (Appendix, B, 6a)

The Missouri Supreme Court's decision

The Missouri Supreme Court based its opinion on state sovereign immunity. The court stated that "[a]s a general rule the sovereign need not refund taxes voluntarily paid even if illegally collected." The court also noted that "provisions waiving sovereign immunity are strictly construed" and that a state "may prescribe the manner, extent, procedures to be followed, and any other 'terms and conditions as it sees fit'". The court found that §144.190 was a limited waiver of sovereign immunity and restricting its application to persons "legally obligated to remit tax" does not result in a constitutional violation. (Appendix A, 3a) The court then turned its attention to Due Process. It noted that "[d]ue process requires that taxpayers be provided with both a 'fair opportunity to challenge the accuracy and legal validity of their tax obligations' and a 'clear and certain remedy'." The court stated that "in addition to the remedy provided under section 144.190, [Petitioner] had an additional remedy provided by the legislature pursuant to section 144.700. [Petitioner] could have paid the taxes under protest and been granted a hearing before allegedly being deprived of any property interest." The court concluded by addressing Petitioner's Equal Protection claim. The court did not address Petitioner's claim that the Missouri Legislature's construction of §144.190, and the Missouri Supreme Court's following interpretation, violates the Case and Controversy Clause. (Appendix A, 4a)

The Missouri payment under protest procedure

The "alternate" sales tax remedy suggested by the Missouri Supreme Court in their opinion in this case is codified in Mo.Rev.Stat. §144.700. (Appendix E, 28a - 29a)

The Missouri Supreme Court held that "[Petitioner] could have paid the taxes under protest and been granted a hearing before allegedly being deprived of any property interest."

Section 144.700 arguably authorizes taxpayers to pay sales tax under protest. Specifically, section 144.700 states that the "[Respondent] shall keep accurate records of any payment of tax made under protest" and that "[a] protest affidavit shall be submitted to [Respondent] within thirty days after the payment is made." It should be noted that this section further states that "[n]othing in this section shall be construed to apply to any refund to which the taxpayers would be entitled under any applicable provision of law." This protest procedure requires the tax amount at issue be paid with the sales tax return on or before the return filing due date. Failure to make such payment will result in the addition of interest and penalties to the disputed tax amount (Mo.Code Regs. §10-3.552). (Appendix E, 30a)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two primary reasons. First, the Missouri Supreme Court's ruling in this case blatantly disregards opinions set forth by this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998). Second, the variances in the construction, application, and interpretation of tax refund statutes, both within Missouri and among the states[3], shows that state legislatures and courts misunderstand the Constitutional requirements they must consider and comply with in tax refund cases.

The questions presented in this case are based on three (3) basic tenets identified in the United States Constitution. First – Due Process. The Missouri Supreme Court's opinion in this case is contrary to this Court's previously established rulings and orders in Due Process tax refund cases. Additionally, Missouri's opinion is inconsistent with its own Due Process determinations and those made in other states.

Second – Case and Controversy. The Missouri Supreme Court failed to address Petitioner's assertion that the Missouri tax refund statute, as interpreted and applied by Respondent and affirmed by the Missouri Supreme Court, violates the Case and Controversy Clause of the United States Constitution because it fails to allow the "real party in interest" an opportunity to directly pursue and participate in a judicial resolution of their interest.

Third – Equal Protection. The Missouri Supreme Court improperly held that the Missouri legislature did not violate the Equal Protection Clause because they had a rational basis for granting different tax refund remedies to

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[3] See Appendix H, 66a - 69a, for a summary by state.

similarly-situated taxpayers. However, that rational basis was neither identified nor discussed.

I. Due Process

This Court has enumerated the procedures a state must follow to comply with Constitutional Due Process in tax refund cases. Respondent and the Missouri Supreme Court have disregarded those requirements.

A. Missouri incorrectly relies on Sovereign Immunity.

This Court should grant certiorari in order to determine the extent that Sovereign Immunity exists in tax refund cases following *McKesson*, and, if it does exist, to determine the proper balance between state Sovereign Immunity and taxpayers Due Process rights to a "fair and meaningful opportunity to challenge" a tax.

This Court has established that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990). The court below ignored this finding and held, "[a]s a general rule the sovereign need not refund taxes voluntarily paid even if illegally collected." *Sprint Communications Company, L.P., v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002). The court continued by stating that:

> "Statutory provisions waiving sovereign immunity are strictly construed, and when the state consents to be sued, it may prescribe the manner, extent, procedures to be followed, and any other 'terms and conditions as it sees fit.'" *Id.*

Contrary to the court's opinion in this case, *McKesson* establishes that a state cannot use sovereign immunity as a justification for restrictive refund requirements that prohibit a taxpayer from challenging the validity of a tax or from obtaining a refund. Even a statute that is strictly and narrowly construed must be constitutional. Once a state waives Sovereign Immunity and consents to be sued for refunds, it must do so in a manner that affords taxpayers the rights and protections guaranteed by the United States Constitution.

The Court should grant certiorari to resolve this conflict between state Sovereign Immunity and taxpayers' Due Process rights in tax refund cases.

B. Missouri does not have a predeprivation refund procedure.

Certiorari should be granted in order for this court to identify the necessary requirements of a constitutionally sufficient predeprivation remedy and to identify whether or not Missouri's payment under protest statute (§144.700) [4] meets such requirements.

This Court specifically enumerated that "when a tax is paid to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *McKesson* at 39. Accordingly, a protest tax payment made in order to avoid imposition of penalties or interest is involuntarily made and does not qualify as a predeprivation procedure.

The Missouri Supreme Court stated that Petitioner was not denied Due Process because Petitioner "has an additional remedy afforded by the legislature pursuant to

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[4] Missouri's payment under protest procedure is codified in Mo.Rev.Stat. §144.700. Therefore, all future references to payment under protest procedure will mean §144.700 and vice-versa.

section 144.700" and Petitioner "could have paid the taxes under protest and been granted a hearing before allegedly being deprived of any property interests." *Sprint* at 835. However, Missouri's payment under protest procedure requires the protested tax amount be paid by the due date or the taxpayer will be subject to interest and penalties[5], therefore, it cannot be considered a constitutionally sufficient predeprivation remedy.

The Missouri Supreme Court's determination in this case is in error, is inconsistent with the previously discussed decisions issued by this Court, and is inconsistent with its own decisions issued after Petitioner's case. Specifically, in *Eddie Bauer, Inc. v. Director of Revenue*, No. SC 83870, slip op. at __ S.W.3d. __, (Mo. banc 2002), (Appendix F, 36a - 41a), the Missouri Supreme Court acknowledged that income tax payment under protest procedures (Mo.Rev.Stat. §143.631 (Appendix E, 24a)) that subject taxpayers to the risk of interest and penalties "do not measure up under *McKesson*." There is no justification for the Missouri Supreme Court's variance in opinions between *Eddie Bauer* and the case at issue here since both protest payment statutes subject the taxpayer to interest and penalties for non-payment.

Missouri's failure to provide predeprivation relief was presented to the court in Petitioner's reply brief and motion for rehearing but was disregarded. This Court should grant certiorari in order to identify the requirements of a constitutionally sufficient predeprivation remedy and rectify Missouri's inconsistent treatment.

C. Missouri does not provide meaningful backward-looking relief.

Certiorari should be granted to determine whether Missouri provides taxpayers meaningful backwards-looking

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[5] Mo. Code Regs. § 10-3.552. (Appendix E, 30a)

relief when it requires taxpayers to file refunds or protest payments through vendors but does not impose a corresponding obligation on those vendors to actually file refunds or protest payments on taxpayer's behalf.

This Court has established that Constitutional Due Process requires, "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson* at 31.

In *Galamet,* the Missouri Supreme Court held that only "those that have a legal obligation to pay sales tax directly to [Respondent]" are allowed to file refund claims under §144.190. Section §144.700 is similar to §144.190 in that it also requires that taxpayers file protest payments through their vendors. As these statutes are currently written and enforced, Petitioner is denied Due Process under both statutes when the vendor goes out of business, refuses, is unwilling, or is otherwise unable to file the protest or refund claim. This requirement, with no procedural safeguards, cannot be upheld as Constitutional.

The District of Columbia Superior Court reached this conclusion in *District Paving Corp. v. District of Columbia*, D.C. Super. Ct. (Tax Div.), Dkt. No. 7268-97, 4/22/99. (Appendix G, 42a - 65a) In *District Paving*, the superior court held that "purely as a matter of due process, it would be unconstitutional to require that taxpayers rely upon vendors in order to pursue their right to a refund for illegally collected taxes." *Id.* The court found that, in tax refund cases, vendors are a totally unreliable avenue of redress against the Government for the following reasons:

1.) They are not the real parties in interest, they have absolutely no impetus to

voluntarily spend their own time and resources to represent customers.

2.) Since the code does not require vendors to pursue tax refunds (even though this is permitted), a taxpayer would not have a legally cognizable cause of action against any vendor that refuses to seek a refund on its behalf.

3.) Vendors have a built-in conflict of interest in pursuing appeals or demanding refunds because vendors are compensated by the District for service as collection agents.

4.) The District's position is predicated on the assumption that the same vendor that collected the disputed tax would still be in existence at a time when the taxpayer would want to demand a refund.

Id.

In *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), the Texas Supreme Court also found that a taxpayer who paid sales tax to a vendor rather than directly to the state should be entitled to file a claim for refund directly with the State without obtaining an assignment of rights. Following this decision, the Texas Comptroller amended Tex. Admin. Code §3.325 (Appendix E, 30a - 34a) to reflect the *Fleming Foods* decision and specifically authorize purchasers to request a refund directly from the state.[6]

In addition to the argument identified above, it should be noted that under current Missouri law vendors are not legally obligated to refund the money back to the taxpayer

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[6] The Comptroller of Public Accounts amendment adoption is reported at 26 Tex.Reg. 3823 (May 25, 2001). (Appendix E, 34a - 35a)

that bore the economic burden of the tax.[7] Therefore, taxpayers are not afforded a "clear and certain remedy" even if they are successful in persuading their vendors to file refunds.

It is abundantly clear that taxpayers are not provided "meaningful backward-looking relief" as required by this Court because: 1) they are not provided a "fair and meaningful opportunity to challenge a tax" because vendors are not legally required to file refunds on their behalf; and 2) they are not provided a "clear and certain remedy" because vendors are not legally obligated to actually refund tax money back to purchasers.

Certiorari should be granted in order to identify the extent to which states can require taxpayers to pursue refunds through third parties and still comply with taxpayers Due Process rights and to address inconsistencies both within Missouri and among the states.

D. The Missouri Supreme Court's denial of a refund was an unconstitutional "bait and switch" under *Reich v. Collins.*

The Missouri Supreme Court erred when it concluded Petitioner was not denied Due Process under §144.190 due to the availability of another supposed "remedy"- - §144.700. Section 144.700 does not satisfy the demands of Due Process. It is not a valid predeprivation remedy nor does it provide "meaningful backward-looking relief." Furthermore, following this Court's opinion in *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998), the Missouri Supreme Court's opinion

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[7] The state auditor expressed concerns that vendors might apply for sales tax refunds and pocket the money rather than return the money to purchasers. *McCaskill calls for end to corporate tax windfall.* May 17, 2000, St. Louis Post-Dispatch. (Appendix I, 70a - 71a)

in this case would be unconstitutional even if §144.700 was a valid predeprivation or postdeprivation procedure.

In *Reich* this Court further clarified the Due Process procedure requirements for tax refund cases when this Court held:

> "But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *midcourse*--to 'bait and switch,' as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists."

Id. at 111. Respondent, similar to Georgia in the *Reich* case, reconfigured their remedies after the fact. At all times throughout the period in question, Missouri recognized that Mo.Rev.Stat. §144.190 codified the sales tax refund procedure. In *Norwin G. Heimos Greenhouse, Inc., v. Director of Revenue*, 724 S.W.2d 505, 506 (Mo. banc 1987), the Missouri Supreme Court stated that "Section 144.190 provides the exclusive remedy for recovery of sales tax." This position was reinforced when the court found, "Refunds of sales tax are governed by § 144.190, RSMo." *Galamet, Inc. v. Director of Revenue*, 915 S.W.2d 331, 336 (Mo. banc 1996). Since §144.700 was enacted in 1959, it was available when these cases were heard, yet, the Missouri Supreme Court did not recognize it as a sales tax refund procedure. Additionally, §144.700(3) specifically provides that "Nothing in this section shall be construed to apply to any refund to which the taxpayer would be entitled to under any applicable provision of law."

At all times §144.190 appeared to be Missouri's "clear and certain" remedy. This is shown from the view of the taxpayer, Respondent, and the Missouri Supreme Court. However, Petitioner's attempts to obtain a refund and challenge the validity of a tax under this statute as it is currently enforced were unsuccessful. Respondent and the Missouri Supreme Court now tell Petitioner that §144.190, previously considered by the court to be the controlling, exclusive refund procedure, is not available to Petitioner because Petitioner was unsuccessful in their attempts to get their vendors to file the refund claims. This is clearly a "bait and switch." This decision violates *Reich* and *Newsweek* and is inconsistent with other Missouri case law.

The decision at issue in this case is contrary to the Missouri Supreme Court's own opinion in *North Supply Co. v. Director of Revenue*, 29 S.W.3d 378 (Mo. banc 2000). In *North Supply,* the Missouri Supreme Court followed the United States Supreme Court and held:

> "It was not apparent that any of the other remedies suggested by the Director provided the exclusive remedy available at the time NSC filed for its tax refund, and NSC was entitled to pursue what appeared to be a clear and certain post-deprivation remedy under sec. 144.190, regardless of the availability of the other remedies."

Id. at 379-80. The Missouri Supreme Court also found that "To the extent that the Director is suggesting that NSC should have availed itself of other remedies under the law, *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), compels the opposite conclusion." *Id.* While Petitioner presented this holding to the Missouri Supreme Court, it was incorrectly disregarded in their opinion issued in this case.

II. Cases and Controversies

A. Missouri's refund statute violates the Cases and Controversies Clause of the United States Constitution.

The Missouri Legislature's enactment of a statute that denies standing to the real party in interest is in violation of the Case or Controversy requirement of the United States Constitution, Article III, section 2. (Appendix D, 21a) Petitioner presented this issue to the Missouri Supreme Court, but the Missouri Supreme Court erred by not addressing it.

Respondent denied Petitioner's claim for sales tax refund on the basis that Petitioner did not have standing to file this claim on their own behalf under Mo.Rev.Stat. §144.190. While the Administrative Hearing Commission and the Missouri Supreme Court affirmed this action, the only question the courts addressed was whether Petitioner had standing under Mo.Rev.Stat. §144.190 as drafted and adopted by the Missouri legislature.

The Administrative Hearing Commission and Missouri Supreme Court never denied that Petitioner paid the tax in question, is the real party in interest, and has standing under general Missouri case law. Mo.Rev.Stat. §144.060 requires every person making a purchase of taxable property or services pay the tax or be guilty of a misdemeanor. Mo.Rev.Stat. §144.080(5) sets forth a vendor's collection duty and makes it unlawful for a vendor to absorb the tax. (Appendix E, 25a-27a)

Furthermore, the Missouri Supreme Court recognized in a previous decision that the purchaser, rather than the vendor, was the real party in interest. This was evidenced by their statement that:

> "... DST is the real party in interest. This is because DST was the purchaser of the

> equipment from Data Switch, which claimed a sales/use tax refund under section 144.190.2 from the state of Missouri for the machinery and equipment purchased by DST. Any tax refund Data Switch would receive would go to DST."

DST Systems, Inc. v. Director of Revenue, 43 S.W.3d 799 (Mo. banc 2001). The Missouri Supreme Court's statement in *DST* reaffirms their previous conclusion that, "[a]lthough the legal burden of the sales tax is not on the purchaser, the economic burden is." *Heimos Greenhouse* at 507.

This Court has identified that "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III--'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,' --is the doctrine of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Case and Controversy requirement of Article III of the Constitution was designed to limit courts "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government." *Flast v. Cohen*, 392 U.S. 82, 95 (1968).

Missouri's legislature has statutorily granted standing to a party (Petitioner's vendor) that has no justiciable interest in the sales tax refund. Therefore, any challenge to the validity of the tax application would not be presented in an adversarial context as intended by the Constitution. Petitioner's vendors have not been denied property, so they have no incentive to spend time, money, and resources defending a claim on Petitioner's behalf. The Case or Controversy requirement of the Constitution should prevent the other branches of government from intruding into areas committed to the judiciary. Statutorily or judicially granting

standing to parties who have no interest in the claim, and denying standing to parties who have been injured and have a direct interest, is contrary to the foundation upon which standing was established.

III. Equal Protection

The 14th Amendment of the United States Constitution sets forth that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." (Appendix D, 21a) The Missouri Supreme Court erred in its determination that Respondent's action did not violate Petitioner's right to Equal Protection.

No rational basis exists for granting different sales tax refund periods to similarly-situated taxpayers merely based on the amount of cooperation a taxpayer receives from their vendor. Under Missouri's sales tax refund law, as applied by Respondent and affirmed by the Missouri Supreme Court, taxpayers with vendors who are uncooperative or no longer in business are precluded from requesting or receiving refunds, taxpayers who successfully get their vendors to file the sales tax return under protest can receive sales tax refunds for amounts paid within the previous thirty (30) days, and taxpayers with cooperative vendors who will actually file the refund claim are allowed to receive a tax refund of sales tax paid over the previous three (3) years. The variance between similarly-situated taxpayers, with no rational basis for such treatment, does not meet the demands of the Equal Protection Clause.

This Court's review of this case is needed to enforce this Court's previous opinions and ensure Missouri complies with the Constitutional Due Process, Equal Protection, and Case and Controversy requirements. This review is also needed to address and resolve inconsistencies that exist both within the State of Missouri and between the other states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Anthony M. Whalen
Sr. State Tax Counsel
Counsel of Record

Audra M. Kunkel
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May 2002

APPENDICES

APPENDIX A

Supreme Court of Missouri,
en Banc.

SPRINT COMMUNICATIONS COMPANY, L.P.,
Appellant,
v.
DIRECTOR OF REVENUE, Respondent.

No. SC 83820.

Jan. 22, 2002.

PETITION FOR REVIEW OF A DECISION OF THE ADMINISTRATIVE HEARING COMMISSION
The Honorable Karen A. Winn, Commissioner

Sprint Communications Company, L.P. (Sprint) appeals the summary determination of the Administrative Hearing Commission (AHC) dismissing its tax refund claims against the Director of Revenue (Director) for lack of standing pursuant to section 144.190. The AHC's decision is affirmed.

I.

Following the determination by this Court that certain technology-related services could be classified as tax-exempt "manufacturing,"[1] Sprint reviewed its service transactions to see if any would qualify for the exemption. Sprint then solicited 105 of its service vendors to whom it had paid sales and use taxes requesting they file tax refunds on their behalf pursuant to section 144.190 or, in the alternative, provide

[1] IBM Corp. v. Director of Revenue, 958 S.W.2d 554 (Mo. banc 1997).

Sprint with the power of attorney authorizing Sprint to pursue the refund claims. Unable to obtain cooperation from six of its vendors, Sprint directly filed for tax refunds from the purchase of these companies' services.[2] The Director declined to process the refund claims related to Sprint's inability to provide the required powers of attorney to seek refunds of the sales or use taxes on behalf of the vendors in question.[3]

Sprint appealed to the AHC alleging that it, not a vendor, was the "real party in interest" and as such Sprint had standing under section 144.190 to demand the refunds. Sprint further contends that not being allowed to pursue its claims would constitute a deprivation of due process and equal protection. The AHC appropriately noted that it does not have the authority to decide constitutional issues[4] and, upon motion by the Director, summarily dismissed Sprint's claim following this Court's construction of section 144.190 in Galamet Inc. v. Director of Revenue.[5] Sprint appeals the AHC's decision to this Court pursuant to article V, section 3 of the Missouri Constitution claiming the matter involves the construction of a state revenue law.

II.

"Interpretations of the state's revenue laws by the AHC are reviewed de novo and are upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly."[6] "'Substantial evidence, is evidence, which if true, has

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[2] The vendors at issue are Wavelinq, Inc. (Texas), IBM (Texas), Sun Microsystems, Inc. (California), Cisco Systems, Inc. (California), General Electric Computer Services (Georgia), and IEX Corporation (Texas). The refunds claimed totaled $1,205,251.86.

[3] See Section 32.057.2(1) and (2); 12 CSR 10-41.030.

[4] State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69 (Mo. banc 1982).

[5] 915 S.W.2d 331 (Mo. banc 1996).

[6] Hermann v. D.I.R., 47 S.W.3d 362, 364 (Mo. banc 2001); and section 621.193.

probative force; it is evidence from which the trier of fact reasonably could find the issues in harmony therewith.'"[7] "This Court considers only the evidence most favorable to the agency's decision, and essentially adopts the factual findings of the AHC."[8] "Decisions on questions of law made by the AHC are matters for this Court's independent judgment."[9]

As a general rule the sovereign need not refund taxes voluntarily paid even if illegally collected.[10] Section 144.190, however, provides a limited waiver of sovereign immunity to allow the recovery of taxes, penalties, or interest paid that have been illegally or erroneously computed or collected.[11] Statutory provisions waiving sovereign immunity are strictly construed, and when the state consents to be sued, it may prescribe the manner, extent, procedure to be followed, and any other "terms and conditions as it sees fit."[12] The plain language of section 144.190 requires that the person requesting the tax refund be the person "legally obligated to remit the tax."[13] Consequently, it is Sprint's vendors, who are statutorily obligated to collect and remit the sales and use taxes, who must file for the tax refund, not Sprint.[14] Sprint's lack of standing under section 144.190, however, does not result in the constitutional violations it claims.

Due process requires that taxpayers be provided with both a "fair opportunity to challenge the accuracy and legal

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[7] Id., citing to, Collins v. Div. of Welfare, 364 Mo. 1032, 270 S.W.2d 817, 820 (1954).

[8] Id.

[9] Id. See also section 536.140.

[10] Ring v. Metropolitan St. Louis Sewer District, 969 S.W.2d 716, 718 (Mo. banc 1998).

[11] Section 144.190; Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975).

[12] Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876, 879-80 (Mo. banc 1993). See also McGhee v. Dixon, 973 S.W.2d 847, 849 (Mo. banc 1998); Spradling, 524 S.W.2d at 823.

[13] Section 144.190.2; Galamet, 915 S.W.2d at 336.

[14] See sections 144.060, 144.080, 144.635, 144.650, 144.655.

validity of their tax obligation" and a "clear and certain remedy."[15] In addition to the remedy provided under section 144.190, Sprint had an additional remedy afforded by the legislature pursuant to section 144.700. Sprint could have paid the taxes under protest and been granted a hearing before allegedly being deprived of any property interests.[16] Sprint's due process rights were not violated by the AHC's determination.

With regard to Sprint's equal protection claim, "A statute that neither touches a fundamental right nor involves a suspect classification will withstand an equal protection challenge if a rational basis for the legislative classification can be found."[17] Sprint does not reference a fundamental right or a suspect classification and rational basis review requires only that the statute be rationally related to a legitimate state purpose.[18] With alternative remedies existing for a purchaser to obtain a refund or protest the tax the legislature cannot be said to have lacked a rational basis for designating the vendor, the party bearing the burden of remittance of the tax, as the party to seek the tax refunds. Sprint did not meet its burden of demonstrating the lack of a rational basis for section 144.190 as enacted and amended.[19]

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[15] North Supply Co. v. Director of Revenue, 29 S.W.3d 378, 379 (Mo. banc 2000) (quoting McKesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990)).

[16] See DST Systems, Inc. v. Director of Revenue, 43 S.W.3d 799 (Mo. banc 2001).

[17] Richardson, 863 S.W.2d at 879; Carter v. Director of Revenue, State of Mo., 805 S.W.2d 154, 156 (Mo.1991). "Suspect classes are classes, such as those based upon race, national origin, or illegitimacy that for historical reasons command extraordinary protection from the majoritarian political process. Fundamental rights include the rights to free speech, to vote, to freedom of interstate travel, as well as other basic liberties." Riche v. Director of Revenue, 987 S.W.2d 331, 336 (Mo. banc 1999).

[18] Riche, 987 S.W.2d at 337.

[19] "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Bert v. Director of Revenue 935 S.W.2d 319, 321 (Mo. banc 1996)(quoting

III.

The AHC's decision is affirmed.

Ronnie L. White, Judge.

Limbaugh, C.J., Holstein, Wolff, Benton and Stith, JJ., and Hoff, Sp. J., concur. Price, J., not participating.

Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858, 861-62 (Mo. banc 1962)). It should be noted that Sprint's equal protection argument relied solely on an analogy to the decision in United States v. Benton to support the proposition that there is no rational basis for preventing Sprint from pursuing the tax refund on its own behalf. United States v. Benton, 975 F.2d 511 (8th Cir.1992). In Benton, the Eighth Circuit had held that the United States Government had standing to file a claim for incorrectly paid taxes on its own behalf when it was reimbursing a contractor for state taxes assessed against the contractor. Id. at 514. The United States Supreme Court, however, vacated the Eighth Circuit's original judgment and remanded. On remand, the Eighth Circuit held that the United States Government did not have standing to pursue the tax refund directly, standing lied with the party who directly remitted the tax to the State. United States v. William H. Melcher, Acting Director of Revenue of Missouri, 508 U.S. 957, 113 S.Ct. 2925, 124 L.Ed.2d 676 (1993); United States v. Janette Lohman, Director of Revenue, State of Missouri, 21 F.3d 844, 845-46 (8th Cir.1994).

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102
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TELEPHONE (573) 751-4144

February 7, 2002

Mr. Anthony M. Whalen
Ms. Audra Kunkel
6500 Sprint Parkway
Mailstop: KSOPHLO512-5A253
Overland Park, KS 66251

In Re: Sprint Communications Company, L.P. vs. Director of Revenue, Missouri Supreme Court No. SC83820

Dear Counsel:

Please be advised that the Court entered the following order on this date in the above-entitled cause:
"Appellant's motion for rehearing overruled." Price, J., not participating.

Very truly yours,
THOMAS F. SIMON
/s/ Cynthia L. Turley
Deputy Clerk, Court en Banc

cc: Ms. Alana Barragan-Scott/Office of Missouri Attorney General

APPENDIX C

Before the Administrative Hearing Commission
State of Missouri

SPRINT COMMUNICATIONS COMPANY, LLP,
Petitioner,
vs.
DIRECTOR OF REVENUE,
Respondent.

No. 01-0119 RV
No. 01-0082 RV

MEMORANDUM AND ORDER

Sprint Communications Company, LLP (Sprint) filed three appeals on January 19, 2001, after receiving three virtually identical letters from the Director of Revenue dated January 5, 2001. We assigned Case Nos. 01-0119 RV, 01-0081 RV, and 01-0082 RV to the cases. Each appeal concerns sales or use taxes paid by Sprint to out-of-state vendors. On February 16, 2001, the Director filed motions for summary determination in each case claiming that Sprint does not have standing to claim a refund under section 144.190.[1]

On April 16, 2001, we held a telephone conference with the parties during which we asked them to address whether the three cases should be consolidated and whether sales or use tax is at issue. We asked the parties to file written responses to these questions by April 26, 2001, which they did. Both parties filed motions to file supplemental briefing, which we grant. Sprint subsequently asked for an opportunity for oral argument on the Director's motion. Because of that request, we held an oral argument on May

[1] All statutory references are to the 2000 Revised Statutes of Missouri.

14, 2001. We also heard testimony and received evidence for the purpose of resolving the pending motions in these cases and in Case No. 01-0081 RV. The Director objects to evidence as to Sprint's attempts to get its vendors to file refund claims or execute powers of attorney as irrelevant for purposes of the pending motions. We overrule the objection, as such evidence is relevant to Sprint's arguments in this case.

We consolidate Case Nos. 01-0019 RV and 01-0082 RV for purposes of this order, and address case No. 01-0081 RV by separate order.

Under our Regulation 1 CSR 15-3.450(4)(C), we must grant a motion for summary determination "if the pleadings and evidence on file show that there is no genuine issue as to any material fact and that any party is entitled to relief as a matter of law[.]"

We grant the Director's motion with respect to refund claims filed by Sprint for tax paid by IBM, Sun, Cisco, General Electric, IEX, and Wavelinq in these two cases.

Findings of Fact

1. In 1997, the Missouri Supreme Court decided *IBM v. Director of Revenue*, 958 S.W.2d 554 (Mo. banc 1997), a case in which it held that certain technology-related services qualified as "manufacturing" within the meaning of the statute exempting from taxation machinery and equipment used to expand manufacturing plants. Following this, Sprint examined its own records to determine whether any of its transactions would qualify for a refund under the same rationale.

2. Sprint identified 831 potential vendors to whom it had paid sales and use tax. Sprint further narrowed that list down to 105 vendors it wished to pursue to file refund claims on its behalf.

3. In April 1998, Sprint sent letters to these vendors requesting that they file refund claims on its behalf. In June 1998, Sprint sent out additional letters to vendors, with power of attorney forms attached. Sprint representatives

also had one or more discussions with representatives of the Department on the general matter of these refund claims during this period.

4. For the next several months, Sprint repeatedly contacted vendors it had not heard from. It was finally left with a group of vendors who either refused to file on Sprint's behalf, refused to permit Sprint to file with a power of attorney, or otherwise failed to respond to Sprint's request.

5. Sprint filed a sales/use tax refund claim, executed on the Director's Form 472B, for each of the vendors involved in these cases as follows:

Case No. / Seller(s)	Amount Claimed
01-0119 RV	
Wavelinq, Inc. (Texas)	$107.956.65
01-0082 RV	
IBM (Texas)	$395,816.83
Sun Microsystems, Inc. (California)	$29,145.17
Cisco Systems Inc. (California)	$638,447.64
General Electric Computer Services [GA]	$26,471.69
IEX Corporation (Texas)	$7,413.88

6. Each refund claim identified the vendor as the taxpayer, and "Sprint Communications Company LP" as the name to be printed on the refund check.

7. The refund claims were signed by Anthony Whalen, a Sprint employee.

8. The refund claims were not accompanied by power of attorney forms authorizing Sprint to act on behalf of the vendors.

9. The Director of Revenue declined to process the refund claim as to Wavelinq (Case No. 01-0119 RV) with a letter dated January 11, 2001, addressed to Anthony M. Whalen at Sprint, stating: "A properly executed Power of Attorney form was not received with the refund request, therefore, your request will not be processed."

10. The Director of Revenue declined to process the refund claims as to the vendors in Case No. 01-0082 RV with a letter dated January 5, 2001, addressed to Anthony M. Whalen at Sprint, stating: "A properly executed Power of Attorney form was not received with the refund request, therefore, your request will not be processed."

11. Sun Microsystems also executed a refund claim that was filed with the Director.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's findings, decisions, and orders. Section 621.050.1. In her motion, the Director states that she does not necessarily agree that we have jurisdiction over these cases. Even if jurisdiction is undisputed by the parties, this Commission should examine its subject matter jurisdiction in each case. *Greene County Nursing & Care Center v. Department of Social Servs.*, 807 S.W.2d 117, 118-19 (Mo. App., W.D. 1991). The Director's refusal to process the refund claims is tantamount to a denial and is thus considered a decision of the Director. *Rees Oil Co. v. Director of Revenue*, 992 S.W.2d 354, 358-61 (Mo. App., W.D. 1999). Therefore, we have jurisdiction over the appeals.

I. Sales Tax or Use Tax

During our April 16 telephone conference, we asked the parties to address whether the tax at issue is sales or use tax. The motions and responses refer to sales tax, but the vendors are all located out-of-state, raising the question of whether the tax is actually use tax. Both parties state that it would be difficult to determine whether the taxes at issue are sales tax or use tax.

Section 144.021 imposes "a tax upon the privilege of engaging in the business, in this state, of *selling* tangible personal property . . . The *primary tax burden* is placed upon the *seller*[.]" (emphasis added). Section 144.060 makes it the duty of every *purchaser* to *pay* sales tax, but section 144.080 makes it the *seller's* duty to *collect and remit* the tax. By contrast, section 144.610.1 imposes use tax on "the privilege

of *storing, using or consuming* within this state any article of tangible personal property [.]" (emphasis added). Section 144.610.2 provides:

> Every person storing, using or consuming in this state tangible personal property is liable for the tax imposed by this law, and the liability shall not be extinguished until the tax is paid to this state, but a receipt from a vendor authorized by the director of revenue under the rules and regulations that he prescribes to collect the tax, given to the purchaser in accordance with the provisions of section 144.650, relieves the purchaser from further liability for the tax to which receipt refers. (Emphasis added.)

Section 144.635 provides:

> Every vendor making a sale of tangible personal property for the purpose of storage, use or consumption in this state shall collect from the purchaser an amount equal to the percentage on the sale price imposed by the sales tax law in section 144.020 and give the purchaser a receipt therefor.

Section 144.655.1 provides:

> Every vendor, on or before the last day of the month following each calendar quarterly period of three months, shall file with the director of revenue a return of all taxes collected for the preceding quarter in the form prescribed by the director of revenue, showing the total sales price of the tangible personal property sold by the vendor, the storage, use or consumption of which is subject to the tax levied by this law, and other information the director of

> revenue deems necessary. The return shall be accompanied by a remittance of the amount of the tax required to be collected by the vendor during the period covered by the return. . . . (Emphasis added.)

Section 144.655.4 provides:

> Except as provided in subsection 5 of this section, every person purchasing tangible personal property, the storage, use or consumption of which is subject to the tax levied by sections 144.600 to 144.748, who has not paid the tax due to a vendor registered in accordance with the provisions of section 144.650, shall file with the director of revenue a return for the preceding reporting period in the form and manner that the director of revenue prescribes, showing the total sales price of the tangible property purchased during the preceding reporting period and any other information that the director of revenue deems necessary for the proper administration of sections 144.600 to 144.748. The return shall be accompanied by a remittance of the amount of the tax required by sections 144.600 to 144.748 to be paid by the person. Returns shall be signed by the person liable for the tax or such person's duly authorized agent. . . .(Emphasis added.)

The parties devote considerable argument to the question of who is the real party in interest in a sales tax refund case, and upon whom the tax burden is actually imposed. The sales and use tax statutes contain ample references to support both parties' positions on this score. At the oral argument, counsel for Sprint stated that sales tax and use tax are at issue here. The parties do not dispute that

Sprint paid all of the tax at issue to the vendors, who in turn remitted it to the Director.[3] Therefore, the tax at issue is either sales tax or vendor's use tax. With respect to both sales tax and vendor's use tax, it is the vendor's statutory responsibility to remit the tax. Thus, the wording of section 144.190 renders the "burden" and "real party in interest" arguments irrelevant as far as AHC proceedings are concerned.[5] For the reasons discussed below, we agree with the Director that it does not matter for purposes of standing whether the tax is sales or vendor's use tax, and to the extent that it may be an issue of fact as to how much sales tax and how much use tax was paid, it is not material for purposes of the present motion.

II. Standing

The Director has moved for summary determination in these cases on the basis that Sprint lacks standing to claim a refund for taxes remitted by another entity. Regulation 1 CSR 15-3.450 provides that we shall grant a motion for summary determination if there is no genuine issue as to any material fact and any party is entitled to relief as a matter of law. Applying that standard to the standing issue raised by the Director in her motion, we will grant her motion if there are no genuine issues of material fact that relate to the standing issue, without reaching the underlying issues of the case.

Section 144.190.2 provides:

> If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such

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[3] (sic) The Director asserts that she does not presently have enough information to verify this, but that these facts are presumed for purposes of the motion.

[5] (sic) Of course, Sprint's constitutional arguments may resurrect this question on appeal.

> sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person *legally obligated to remit the tax* (emphasis added).

Section 144.696 applies section 144.190 to the use tax.

The Director claims that Sprint, as a purchaser of materials, did not remit the tax and therefore does not have standing to claim a refund. Sprint makes a variety of practical and legal arguments to the contrary. It argues that it has standing under *State ex rel. Ryan v. Carnahan*, 960 S.W.2d 549, 550 ("Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury") and similar cases. It argues that it has more at stake in such a refund claim than its vendors, who have no incentive to pursue the claim. It suggests that the 1988 changes to section 144.190 were designed to expand, not contract, the class of parties who can file a refund claim. Sprint argues that if it is not allowed to pursue its claim, it has been denied both due process of law and equal protection of the laws. It cites *U.S. v. Benton*, 975 F.2d 511 (8th Cir. 1992), a case in which the court found the United States to have standing to make a refund claim for tax paid by a government contractor. It also cites *DST Systems, Inc. v. Director of Revenue*, 2001 WL 348961 (Mo. banc 2001), for the proposition that the purchaser is the real party in interest and thus must have standing to claim a refund of sales taxes paid.

This Commission does not have authority to decide constitutional issues. *Williams Cos. v. Director of Revenue*, 799 S.W.2d 602, 604 (Mo. banc, 1990). Therefore, we do not address Sprint's constitutional claims, but we note that they have been properly raised if Sprint wishes to pursue them further. We agree with Sprint that under general principles of standing such as those enunciated in *Ryan v.*

Carnahan, it has a sufficiently strong interest in the case. Sprint also makes persuasive practical arguments. *Benton* and *DST* both support its argument that it is the "real party in interest."

In *Benton*, the 8th Circuit Court of Appeals found that the United States had standing to bring an action seeking a refund of sales taxes paid by its contractor. The court in that case rejected the Director of Revenue's arguments that the federal court lacked jurisdiction over a state revenue law dispute, and that the United States lacked standing because of the terms of its contract.

In *DST*, similarly, the Missouri Supreme Court noted that DST, although the purchaser in the transaction at issue, was the "real party in interest" because any tax refund that Data Switch (the seller) would receive would go to DST. In *DST*, we consolidated the case of a vendor, Data Switch, which had brought a refund claim, with the cases of the purchaser, DST, which had also paid some use tax under protest. The court was merely explaining why, for purposes of the opinion, references to DST included Data Switch.

By contrast, the Director cites *Galamet Inc. v. Director of Revenue*, 915 S.W.2d 331 (Mo. banc 1996), to support her position. In *Galamet*, the court held that a purchaser of electricity who paid sales tax directly to the utility provider did not have standing to demand a refund of sales tax from the Department of Revenue under section 144.190. The *Galamet* court noted the following history of section 144.190, the sales tax refund statute:

> The controlling issue is whether Galamet, as a purchaser, has standing to demand a refund directly from the Department of Revenue. Refunds of sales tax are governed by § 144.190, RSMo, and 12 CSR 10-3.516 and 12 CSR 10-3.520. In *Norwin G. Heimos Greenhouse v. Rev. Director,* 724 S.W.2d 505 (Mo. banc 1987), this Court reasoned that the legislature, by

> use of the general word "person" in § 144.190, intended to allow anyone burdened by the collection of sales tax to request a refund. *Id.*, at 507. While 12 CSR 10-3.520 purported to limit standing only to sellers, the Court held the regulation invalid because it was "plainly inconsistent with the terms of § 144.190." *Id.*
>
> After *Greenhouse*, however, the legislature amended § 144.190 so that the term "person" is now limited to "the person legally obligated to remit the tax." 1988 *Mo. Laws* 571. While purchasers have a statutory duty to pay sales tax to sellers under § 144.060, it is the person receiving that payment who has the duty to "remit" the taxes to the Director. §144.080.1, RSMo. Thus the legislature amended § 144.190 with the apparent intent to limit refunds to those who have a legal obligation to pay sales tax directly to the Department of Revenue. Because Galamet has no legal obligation to make this direct payment, it has no standing to request a refund under § 144.190. Galamet's remedy, if any, is to prevail upon KCP & L, the statutory remittor of the sales tax, to apply for the refund.

Galamet, *id.*, at 336.

Benton was decided in 1992 by a federal court. It did not specifically address the wording of section 144.190. The court noted, in disposing of the Director of Revenue's procedural claims, that "the interpretation of a contract between the United States and another party depends on federal law . . . In such a situation, the Tax Injunction Act does not bar the United States from seeking a resolution of this federal question in a federal forum." *Benton*, 975 F2d at 513. The Director's standing argument in that case was

based on the terms of the contract between the parties; the court did not address the wording of section 144.190. The construction of section 144.190 was likewise not at issue in *DST*. The court added the footnote that Sprint cites to in order to explain that its references to "DST" included Data Switch, another petitioner and a vendor in the case. Moreover, DST had also paid some use tax to the Director under protest in that case, so it is further distinguishable.

Galamet was decided in 1996 by the Missouri Supreme Court, and it addressed section 144.190 specifically. Sections 144.021 and 144.655 impose upon the seller the duty to remit sales tax and vendor's use tax. Although section 144.610.2 provides that the purchaser is liable for the use tax, but that such liability is excused if the purchaser has a receipt from a registered vendor, section 144.610 does not impose on the purchaser the obligation to remit the tax. Section 144.655.4 imposes on the purchaser an obligation to remit the tax only if the purchaser has not paid the tax to a registered vendor. In the present cases, there is no dispute, for purposes of this motion, that Sprint paid the tax to the vendor, which in turn remitted the tax to the Director. Therefore, under section 144.190, the seller is the party "legally obligated to remit the tax," and is the proper party to claim a refund. The Director's sales tax Regulation 12 CSR 10-3.520 and use tax Regulation 12 CSR 10-4.255, although rescinded October 30, 2000, were in effect at the time of the refund claims, and are in accordance with this conclusion.

Regulation 12 CSR 10-3.520 provides:

> The seller whose sales tax account has been credited the sales tax is the person who is to request a refund or credit. No other person may make a refund request to the Department of Revenue. Persons who make erroneous payment to a seller should seek their monies back directly from the seller.

Regulation 12 CSR 10-4.255 provides, as to use tax:

> The person who is to request a refund or credit is the person whose account has been credited for the tax by the Department of Revenue. Any other persons should make their requests to the vendor who in turn will request the tax from the Department of Revenue after following 12 CSR 10-4.275 [application for refund].

Although we are not bound by the Director's regulations, we find that they are consistent with our application of section 144.190 and that the seller is the proper party to bring a claim for refund of sales tax or vendor's use tax.

III. Power of Attorney

The Director's Regulation 12 CSR 10-41.030 provides:

> The director of revenue or other designated official of the Missouri Department of Revenue is permitted to disclose all tax information, returns, reports or facts relating to a particular taxpayer's return to the duly authorized representative of the taxpayer with respect to the tax matter designated by the taxpayer.
>
> In order for a third party to qualify as a duly authorized representative, the taxpayer must execute and file with the Department of Revenue a power of attorney designating the third party as taxpayer's duly authorized representative. Power of Attorney/Disclosure of Information forms are available upon request from the Department of Revenue.

In light of the Missouri Supreme Court's explicit construction of section 144.190 in *Galamet*, which is also consistent with the Director's regulations, we believe that we have no authority to find standing for Sprint where it has

filed the refund claim but has not submitted a power of attorney for the actual seller, which would entitle Sprint, rather than the seller, to pursue the refund claim. As the court stated in *Galamet*, the purchaser must prevail upon the statutory remitter of the tax to file a refund claim; or, under the Director's Regulation 12 CSR 10-41.030, it should at least obtain a power of attorney from the vendor, thus allowing the purchaser to act on behalf of the vendor for purposes of the refund claim.

Sprint was not the party legally obligated to pay the tax, and was not entitled to bring the refund claims on behalf of the vendors unless it had a power of attorney authorizing it to act on their behalf for purposes of bringing the refund claims. In these cases, there was no power of attorney form accompanying the refund claims that Sprint purported to file on behalf of the vendors. We recognize Sprint's claims that it attempted to contact the vendors and have them file refund claims or execute powers of attorney allowing Sprint to pursue the claims, but was unable to obtain their cooperation. However, this Commission, as an administrative tribunal, must apply the terms of the statutes as written, *Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985), and we have no authority to rule on arguments that section 144.190 is unconstitutional or leads to an inequitable result. Sprint purported to file refund claims on behalf of the vendors, but the claims were not accompanied by powers of attorney allowing Sprint to pursue the claims on behalf of the vendors. Therefore, there is no genuine issue of material fact, and we must grant the Director's motion for summary determination.[6]

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[6] We recognize evidence in the record that Sun Microsystems has filed a refund claim, which, as a vendor, it has standing to do. We assume, given the rationale behind the Director's motion for summary determination, that she issued her refusal to process refund claims only as to the claims brought by Sprint for a refund of taxes paid by the vendors. Therefore, we note that Sun Microsystems' refund claim, brought by that company as a vendor, is not barred.

Summary

We consolidate Cases 01-0019 RV and 01-0082 RV for purposes of this order.

We grant the Director's motion for summary determination.

SO ORDERED on July ___, 2001.

KAREN A. WINN
Commissioner

APPENDIX D
Relevant Constitutional Provisions

United States Constitution Article III § 2.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

United States Constitution Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

State of Missouri Constitution Article I § 10.

Section 10. That no person shall be deprived of life, liberty or property without due process of law.

APPENDIX E
Relevant Statutory and Administrative Provisions

Mo. Rev. Stat. § 143.631 (2000).

Protest by taxpayer, effect of--request for informal hearing--payment under protest, written statement required, content--receipt of deposit, duties of director--request for return of deposit, when, effect.

1. Within sixty days (one hundred fifty days if the taxpayer is outside the United States) after the mailing of a notice of deficiency, the taxpayer may file with the director of revenue a written protest against the proposed assessment in which he shall set forth the grounds on which the protest is based. If a protest is filed, the director of revenue shall reconsider the proposed deficiency.

2. A taxpayer's protest may include a request for an informal hearing with the director. If such a request is made, an informal hearing shall be heard. The informal hearing shall be a forum for discussion of the merits of the proposed assessment. The parties shall also consider the possibility of negotiating a settlement of the contested tax liability.

3. If a taxpayer has filed a timely protest under subsection 1 of this section, the taxpayer may, at any time before an assessment has become final, make a deposit with the director of revenue of any part or all of the tax, interest, additions to tax or penalties proposed in the notice of deficiency. The deposit shall be accompanied by a written statement setting forth:

(1) The identification of the tax and the tax period to which the deposit applies;

(2) The amount of tax, interest, additions to tax or penalties to which the deposit is to be applied by the director; and

(3) Such other identifying information as the director of revenue may by regulation provide.

(4) Upon receipt of a timely deposit under subsection 2 of this section, the director of revenue shall issue a receipt to the taxpayer acknowledging receipt of the deposit, and confirming the amount of tax, interest, additions to tax and penalty to which the deposit has been applied. All such deposits shall be deposited in the general revenue fund of the state as payments of tax, interest, additions to tax and penalty, as the case may be. The director of revenue shall refuse the tender of any deposit which does not satisfy the requirements of this section, and shall return such payment to the taxpayer.

(5) A taxpayer which had made a deposit under this section which has been accepted by the director of revenue may at any time before an assessment has become final or an action has been filed in the circuit court of Cole County under subsection 5 of section 143.841, request in writing that the director of revenue return the deposit to the taxpayer. The director of revenue shall return such deposit without interest if a written request is made. The taxpayer's request for return of a deposit shall not be treated under this chapter as a claim for refund for purposes of section 143.821.

(6) The payment under protest provision provided by this section shall only apply to taxes imposed by this chapter and shall not be incorporated by reference to apply to taxes imposed by other chapters.

Mo. Rev. Stat. § 144.060 (2000).

Purchaser to pay sales tax--refusal, a misdemeanor--exception.

It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by sections 144.010 to 144.510 to pay, to the extent possible under the provisions of section 144.285 , the amount of such tax to the person making such sale or rendering such service; any person who shall willfully and intentionally refuse to pay

such tax shall be guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to any person making any purchase or sale of a motor vehicle subject to sales tax as provided by the Missouri sales tax law.

Mo. Rev. Stat. § 144.080 (2000).

Seller responsible for tax--rules--returns--unlawful to advertise absorption of tax--penalty.

1. Every person receiving any payment or consideration upon the sale of property or rendering of service, subject to the tax imposed by the provisions of sections 144.010 to 144.525, is exercising the taxable privilege of selling the property or rendering the service at retail and is subject to the tax levied in section 144.020. The person shall be responsible not only for the collection of the amount of the tax imposed on the sale or service to the extent possible under the provisions of section 144.285, but shall, on or before the last day of the month following each calendar quarterly period of three months, file a return with the director of revenue showing the person's gross receipts and the amount of tax levied in section 144.020 for the preceding quarter, and shall remit to the director of revenue, with the return, the taxes levied in section 144.020, except as provided in subsections 2 and 3 of this section. The director of revenue may promulgate rules or regulations changing the filing and payment requirements of sellers, but shall not require any seller to file and pay more frequently than required in this section.

2. Where the aggregate amount levied and imposed upon a seller by section 144.020 is in excess of two hundred and fifty dollars for either the first or second month of a calendar quarter, the seller shall file a return and pay such aggregate amount for such months to the director of revenue by the twentieth day of the succeeding month.

3. Where the aggregate amount levied and imposed upon a seller by section 144.020 is less than forty-five dollars in a calendar quarter, the director of revenue shall by regulation permit the seller to file a return for a calendar year. The

return shall be filed and the taxes paid on or before January thirty-first of the succeeding year.

4. The seller of any property or person rendering any service, subject to the tax imposed by sections 144.010 to 144.525, shall collect the tax from the purchaser of such property or the recipient of the service to the extent possible under the provisions of section 144.285, but the seller's inability to collect any part or all of the tax does not relieve the seller of the obligation to pay to the state the tax imposed by section 144.020; except that the collection of the tax imposed by sections 144.010 to 144.525 on motor vehicles and trailers shall be made as provided in sections 144.070 and 144.440.

5. It shall be unlawful for any person to advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof imposed by sections 144.010 to 144.525, and required to be collected by the person, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Mo. Rev. Stat. § 144.190 (2000).

Refund of overpayments--claim for refund--time for making claims --paid to whom--direct pay agreement for certain purchasers.

1. If a tax has been incorrectly computed by reason of a clerical error or mistake on the part of the director of revenue, such fact shall be set forth in the records of the director of revenue, and the amount of the overpayment shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance shall be refunded to the person legally obligated to remit the tax, such person's administrators or executors, as provided for in section 144.200.

2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

3. Every claim for refund must be in writing and signed by the applicant, and must state the specific grounds upon which the claim is founded. Any refund or any portion thereof which is erroneously made, and any credit or any portion thereof which is erroneously allowed, may be recovered in any action brought by the director of revenue against the person legally obligated to remit the tax. In the event that a tax has been illegally imposed against a person legally obligated to remit the tax, the director of revenue shall authorize the cancellation of the tax upon the director's record.

4. Notwithstanding the provisions of this section, the director of revenue shall authorize direct-pay agreements to purchasers which have annual purchases in excess of seven hundred fifty thousand dollars pursuant to rules and regulations adopted by the director of revenue. For the purposes of such direct-pay agreements, the taxes authorized pursuant to chapters 66, 67, 92 and 94, RSMo, shall be remitted based upon the location of the place of business of the purchaser.

Mo. Rev. Stat. § 144.700 (2000).

Revenue placed in general revenue, exception placement in school district trust fund--payment under protest, procedure, appeal, refund.

1. All revenue received by the director of revenue from the tax imposed by sections 144.010 to 144.430 and 144.600

to 144.745, except that revenue derived from the rate of one cent on the dollar of the tax which shall be held and distributed in the manner provided in sections 144.701 and 163.031, RSMo, shall be deposited in the state general revenue fund, including any payments of the taxes made under protest.

2. The director of revenue shall keep accurate records of any payment of the tax made under protest. In the event any payment shall be made under protest:

(1) A protest affidavit shall be submitted to the director of revenue within thirty days after the payment is made; and

(2) An appeal shall be taken in the manner provided in section 144.261 from any decision of the director of revenue disallowing the making of the payment under protest or an application shall be filed by a protesting taxpayer with the director of revenue for a stay of the period for appeal on the ground that a case is presently pending in the courts involving the same question, with an agreement by the taxpayer to be bound by the final decision in the pending case.

3. Nothing in this section shall be construed to apply to any refund to which the taxpayer would be entitled under any applicable provision of law.

4. All payments deposited in the state general revenue fund that are made under protest shall be retained in the state treasury if the taxpayer does not prevail. If the taxpayer prevails, then taxes paid under protest shall be refunded to the taxpayer, with all interest income derived therefrom, from funds appropriated by the general assembly for such purpose.

Mo. Code Regs. § 10-3.520. Who should request refund.

(1) The seller whose sales tax account has been credited the sales tax is the person who is to request a refund or credit. No other persons may make a refund request to the Department of Revenue. Persons who make erroneous

payments to a seller should seek their monies back directly from the seller.

(Revised eff. 1-1-81; repealed eff. 10-30-2000.)

Mo. Code Regs. § 10-3.552. Protest payments.

(1) If the taxpayer in good faith believes that s/he is not subject to the sales tax under the Missouri sales tax act, s/he may upon payment of the required amount of tax and denoting such as a protest payment when made, file a protest payment affidavit, wherein he shall specifically set out why s/he is protesting payment of the tax and give supporting information. The protest claim shall be made under oath and submitted within thirty days after the protest payment. Failure to denote the payment as made under protest, or to make a protest claim within the time required and under the conditions specified, will void the protest claim.

(2) Protest payment forms (DOR-163) are available from the director of revenue upon request. Written request should be sent to Business Taxes Bureau, Technical Support Section, P.O. Box 840, Jefferson City, MO 65105.

(3) If a protest payment is not made by the required due date, interest and additions to tax should be included in the payment to properly perfect the protest.

(Revised eff. 1-12-85.)

Tex. Admin Code § 3.325. Refunds, interest and payments under protest.

(a) Tax paid to state.

Any person, his attorney, assignee, executor, or administrator, may request from the comptroller a refund of any tax remitted to the state but that was not due.

(1) A claim for refund of an amount paid pursuant to a deficiency determination is timely for all transactions that are included in the deficiency determination if made in accordance with subparagraphs (B) or (C) of this paragraph. A claim for refund for items that are not included in a deficiency determination must be made in accordance with

subparagraph (A) of this paragraph. The refund request must be made within:

(A) four years from the date on which the tax was due and payable as defined in Tax Code, § 151.401 or

(B) six months after a determination for the periods for which refund is claimed becomes final; or

(C) six months after any determination would have become final had payment not been made before the due date.

(2) Before the expiration of the statute of limitations, the comptroller and a taxpayer may agree in writing to an extension of the Statute of Limitations.

(3) An extension of the statute of limitations applies only to the periods that are specified in the agreement. Any assessment or refund request that pertains to periods for which limitations have been extended must be made prior to the expiration date of the agreement. Following expiration of the agreement, the Statute of Limitations applies to subsequent assessments and refund requests as if no extension had been agreed.

(4) The request for refund must be made in writing and must state the specific grounds upon which the claim is founded. The request must also indicate the period for which the claimed overpayment was made.

(5) In determining the statute of limitations for filing a refund claim, the time during which an administrative proceeding is pending before the comptroller for the same period is not counted. A taxpayer may not file a sales tax refund claim for the same transaction and for the same time period as a refund claim previously denied.

(6) Failure to file a claim within the limitation prescribed by this section constitutes a waiver of any demand against the state on account of overpayment.

(b) Tax paid to seller.

A person who remits tax to a permitted seller may request from the seller or the comptroller a refund of Texas tax paid in error. The following procedures must be used.

(1) Seller who requests a refund from the comptroller.

(A) Before a seller refunds to a purchaser tax collected in error, the seller must obtain from the purchaser a properly completed exemption or resale certificate that meets all the requirements of § 3.285 of this title (relating to Sales for Resale; Resale Certificates) and § 3.287 of this title (relating to Exemption Certificates). The seller must retain the certificate to document the basis for the refund.

(B) After the seller has refunded or, with the purchaser's written consent, credited the tax to the account of the purchaser, the seller may then seek reimbursement from the state in accordance with the procedures that are outlined in subsection (a) of this section or take a credit on the seller's next return in the amount refunded or credited to the account of the purchaser.

(2) A purchaser who requests a refund from the comptroller.

(A) A purchaser who requests a refund from the comptroller must submit to the comptroller a written request that states the basis for the refund and includes the following information:

(i) the seller's name, address, and either the sales tax permit number or information that will enable the comptroller to identify the seller's sales tax permit number;

(ii) the invoice number, if applicable;

(iii) the date of purchase;

(iv) a description of the item purchased;

(v) the basis for the refund;

(vi) information that identifies the local taxing authorities for which tax was paid; and

(vii) a statement or reasonable estimate of the amount of the tax refund requested.

(B) The comptroller may require a person to submit additional information to verify the refund claim. The person must show to the satisfaction of the comptroller that the refund is due and make available to the comptroller any

documentation that the comptroller requires to process the refund.

(C) A purchaser who holds a sales and use tax permit may amend the return for the period in which the overpayment was made or file a refund claim with the comptroller for sales tax paid in error to a seller. The refund claim must identify the period in which the tax was originally paid. The purchaser must retain, for the period required in Tax Code, Chapter 111, all documentation that is necessary to support the credit.

(c) Interest.

(1) Except as provided by paragraphs (2) and (3) of this subsection, in a comptroller's final decision on a claim for refund or in an audit, interest accrues at the rate that is set in Tax Code, § 111.060 , on the amount that is found to be erroneously paid:

(A) beginning on the later of 60 days after the date of payment or the due date of the tax report; and

(B) ending on, as determined by the comptroller, either:

(i) the date of allowance of credit that results from a final decision that the comptroller has issued, or from an audit; or

(ii) a date that is not more than 10 days before the date of the refund warrant.

(2) The interest rate for a refund that is granted for a period for which a report is due after December 31, 1999, is the rate set in Tax Code, § 111.060 . A refund for a period for which a report is due before January 1, 2000, does not accrue interest.

(3) Credits taken by a taxpayer on the taxpayer's return do not accrue interest.

(4) No taxes, penalties, or interest will be refunded to a person who has collected the taxes from another person until all taxes are first refunded to the party from whom they were collected.

(d) Payments under protest.

A person who intends to file suit under Tax Code, Chapter 112, Subchapter B, must submit to the comptroller a letter of protest with the payment of the tax that is the subject of the protest. See subsection (e) of § 3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers). The letter of protest must state fully and in detail every reason that the taxpayer contends that the assessment is unlawful or unauthorized, and must accompany the payment. If the payment and letter of protest do not accompany one another, the payment will not be deemed to have been made under protest. For the taxpayer's convenience, the comptroller will advise the taxpayer of the amount of payment under protest that the comptroller has received and the date of the payment.

(Revised at 26 TexReg No. 21, eff. 5-28-01.)

26 Tex. Reg. 3823.

TITLE 34.PUBLIC FINANCE
Part 1. COMPTROLLER OF PUBLIC ACCOUNTS
Chapter 3. TAX ADMINISTRATION
Subchapter O. STATE SALES AND USE TAX
34 TAC §3.325

The Comptroller of Public Accounts adopts an amendment to §3.325, concerning refunds, interest, and payments under protest, without changes to the proposed text as published in the February 2, 2001, issue of the Texas Register (26 Tex. Reg 1115).

Subsection (c) of this section is amended to provide for the payment of interest on a claim for refund or in an audit as directed under Senate Bill 1321, 76th Legislature, 1999. Amendments to this section for interest paid on a claim for refund or as the result of an audit are effective for reports due on or after January 1, 2000. Subsection (b) is amended to allow purchasers, who paid sales or use tax to a vendor in error, to request a refund directly from the state, pursuant to the decision in *Fleming Foods of Texas v. Rylander* . Subsections (c) and (d) were also amended to delete obsolete

language. Nonsubstantive grammatical corrections are made to subsection (a).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §111.064.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 8, 2001.

TRD-200102593

Martin Cherry

Deputy General Counsel for Tax Policy and Agency Affairs

Comptroller of Public Accounts

Effective date: May 28, 2001

Proposal publication date: February 2, 2001

For further information, please call: (512) 463-3699

APPENDIX F

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Missouri,
en Banc.

EDDIE BAUER, INC., Appellant,
v.
DIRECTOR OF REVENUE, Respondent.

No. SC 83870.

Feb. 26, 2002.

PETITION FOR REVIEW OF A DECISION OF THE ADMINISTRATIVE HEARING COMMISSION
Sharon Busch, Commissioner.

Eddie Bauer, Inc. (Eddie Bauer), a wholly-owned subsidiary of Spiegel, Inc. (Spiegel), seeks review of a decision of the Administrative Hearing Commission (AHC) affirming the Director of Revenue's (Director) denial of an application for a refund of income taxes paid by Eddie Bauer as a separate company for the years 1995, 1996, and 1997. Eddie Bauer paid these taxes on a separate company basis due to a statutory provision restricting consolidated filings, which this Court has since found unconstitutional. Because resolution of the issues involves the construction of revenue laws, this Court has jurisdiction. Mo. Const. art. V, sec. 3. The decision of the AHC is reversed, and the case is remanded.

I.

Section 143.431.1(3), RSMo 2000, effective January

1, 1973, imposed a requirement that an affiliated group of corporations must derive 50 percent or more of its income within Missouri, as well as file a federal consolidated income tax return, in order to qualify to file a Missouri consolidated income tax return. As an affiliated group, Spiegel, Eddie Bauer, and several of Spiegel's other subsidiaries (collectively the Spiegel Group) filed federal consolidated income tax returns for the tax years beginning January 1, 1995 through the end of 1997. However, neither Eddie Bauer, nor the Spiegel Group, has ever derived 50 percent or more of its income from sources within Missouri. Therefore, under the statute, Eddie Bauer was relegated to filing separate returns and the Spiegel Group was prohibited from electing the more favorable income tax treatment available for consolidated returns.

In 1998, this Court ruled that insofar as section 143.431.1(3) required an affiliated group to meet the 50 percent income threshold before the group could elect to file a Missouri consolidated return, the statute violated the Commerce Clause. *General Motors Corp. v. Dir. of Revenue,* 981 S.W.2d 561 (Mo. banc 1998). As a result of this Court's severance of the offending provision, the only requirement for electing a consolidated return is that the taxpayer's affiliated group file a federal consolidated return.

After the *General Motors* decision, the Spiegel Group filed amended Missouri consolidated tax returns for the years 1995, 1996, and 1997 under the taxpayer name of "Spiegel, Inc., Eddie Bauer, Inc., and Combined Affiliates," claiming refunds for each of those years. On April 26, 2000, the Director issued a "Final Decision" denying each of the claims. Thereafter, Eddie Bauer filed a complaint with the AHC. On July 9, 2001, the AHC issued an opinion and order denying the refund claims and holding that Eddie Bauer was not entitled to relief because its only remedy was to have withheld payment of the contested taxes and challenged their validity by filing a protest under section 143.631.1, RSMo 2000. This appeal followed.

II.

This Court reviews *de novo* decisions of the AHC interpreting the state's revenue laws, *Hermann v. Director of Revenue,* 47 S.W.3d 362, 364 (Mo. banc 2001), and will uphold such decisions "when authorized by law and supported by competent and substantial evidence upon the record." *Id.*

Federal due process requires states to offer taxpayers procedural safeguards against "unlawful exactions." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 36, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). States may meet this requirement by offering taxpayers a pre-deprivation remedy, which allows the taxpayer a meaningful opportunity to withhold the tax and dispute the amount owed, a post-deprivation remedy, which allows taxpayers to challenge the amount paid and obtain a refund if it is determined the tax was wrongfully collected, or a combination of both. *Id.* at 36-37.

Missouri's income tax laws purport to offer both pre-deprivation and post-deprivation alternatives for contesting the validity of a tax. Section 143.631 allows a taxpayer to withhold payment of the tax and file a written protest with the Director and to request an informal hearing on the matter. Alternatively, under section 143.801, RSMo 2000, a taxpayer may first pay the tax and then claim a refund within three years of filing the return, or within two years of payment, whichever is later. In any event, due process requires that taxpayers be afforded a "meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson,* 496 U.S. at 26-27. Therefore, Eddie Bauer must be afforded some sort of remedy because the holding of *General Motors*-- that the 50 percent threshold provision of sec. 143.431.3(1) is unconstitutional--must be applied retroactively to similarly situated litigants. *See Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

The Director contends that a refund is not available

under section 143.801 because Eddie Bauer filed the original returns as a separate entity, and the request for refund was filed in the name of the Spiegel Group in order to obtain the benefit of the consolidated return. As the Director explains, Spiegel is not entitled to a refund because Spiegel was not a Missouri taxpayer for the years at issue. In lieu of section 143.801, the Director contends that Eddie Bauer could have, but did not, avail itself of the first alternative by withholding payment of the tax due, filing a consolidated return with Spiegel, and filing a written protest with the Director under section 143.631. That alternative, the Director notes, was the remedy employed successfully by the taxpayer in *General Motors.*

The Director also suggests that Eddie Bauer and Spiegel could have exercised a "dual filing option" whereby Eddie Bauer could have filed as a separate entity and sought a refund under section 143.801, and Spiegel could simultaneously have filed a consolidated return and sought a refund under section 143.801, as well. In that way, both Spiegel and Eddie Bauer would qualify as taxpayers, and one or the other would have been entitled to a refund depending on the outcome of the *General Motors* litigation.

Neither of the Director's suggested remedies are viable. The pre- deprivation option of section 143.631, under which Eddie Bauer and Spiegel could have filed a consolidated return, withheld payment, and filed a protest challenging the 50 percent threshold of section 143.431.1(3), would have subjected the taxpayers to the risk of a penalty. Had Eddie Bauer and Spiegel filed a consolidated return in violation of the 50 percent threshold, the Director could have invoked section 143.751.1, RSMo 2000, which provides that if a tax deficiency is due to "negligence or intentional disregard of rules and regulations (but without intent to defraud) there shall be added to the tax an amount equal to five percent of the deficiency." That was indeed the fate of the taxpayer in *General Motors.* Until the case was overturned on appeal, the Director imposed that five percent

penalty--more than $500,000-- against General Motors for filing a consolidated return in violation of the 50 percent threshold. In this case, to avoid a penalty, Eddie Bauer had to pay the tax, but therein lies the problem. The United States Supreme Court has held that when a tax must be paid in order to avoid financial penalties, that tax is paid under "duress" in the sense that the state has not provided a fair and meaningful pre-deprivation procedure. *McKesson,* 496 U.S. at 37. The Director's suggested pre-deprivation procedure does not measure up under *McKesson.*

The "dual filing option" is no less problematic. According to *McKesson,* when taxpayers are relegated to a post-deprivation refund action, "the [s]tate must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 39 (citations omitted). The "dual filing option" was neither clear nor certain. As to the Spiegel Group, it was prohibited by statute, and the Director points to no case or common practice in which it has been adopted or allowed. An unknown and untested remedy--partly prohibited by statute--is not a clear and certain remedy.

Finally, the Director claims that Eddie Bauer could have challenged the validity of the 50 percent threshold by seeking declaratory and injunctive relief. A substantially similar claim was refuted in *McKesson,* which held that awarding taxpayer declaratory and injunctive relief against continued enforcement of the offending statute was prospective relief only, and, for that reason, did not satisfy the state's obligation under the Due Process Clause, which requires "meaningful backward-looking relief to rectify any unconstitutional deprivation." CG*Id. CG* at 31. Declaratory and injunctive relief are constitutionally inadequate because the taxpayer is not afforded a remedy to recover its payment of unlawful taxes.

III.

In the absence of a meaningful pre-deprivation or post-deprivation remedy for the unlawful collection of income taxes under section 143.431.1, the decision of the AHC is reversed. The case is remanded for recalculation of income tax liability under the amended consolidated returns filed by Spiegel.

All concur.

Stephen N. Limbaugh, Jr., C.J.

APPENDIX G

DISTRICT PAVING CORP.
v.
DISTRICT OF COLUMBIA

District of Columbia Superior Court

No. 7268-97,

April 22, 1999

MEMORANDUM OPINION AND ORDER

OPINION

This litigation presents a case of first impression, focusing upon three significant issues affecting collection of gross sales tax: (1) whether the taxpayer (rather than exclusively the vendor) has any standing to request a refund of gross receipt taxes and to appeal the denial of such request; (2) whether an unsworn request for refund can be cured by the subsequent submission of a written oath; and (3) whether statutorily exempt purchases of utility power for manufacturing purposes which are manifestly not for "resale" may be subject to refunds where the taxpayer had not yet acquired an exemption certificate prior to those discrete sales.

In this tax appeal, the Petitioner seeks a refund of certain sums ($29,920.29) that were paid as gross sales taxes, for the period of November, 1991 to August, 1995.[1] The Petitioner herein is unquestionably engaged in the business of manufacturing asphalt. The purchases upon which the taxes were collected were the sales taxes imposed upon certain of the Petitioner's purchases of gas and electric power from two local utility companies, Washington Gas Light Co.

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[1] Such taxes are sometimes known as "gross receipts" taxes.

and Potomac Electric Co. (PEPCO). The utilities had collected the taxes as part of their regular billings for utility service.

The crux of Petitioner's appeal is that its particular business activity is statutorily exempt from taxation of certain purchases and that no certificate from the Department of Finance and Revenue (hereinafter "DFR") was needed at the time that the disputed taxes were collected. Petitioner relies upon the three-year statute of limitations for demanding refunds, retroactively from the date of actually obtaining an exemption certificate.

The District opposes the instant Motion and seeks summary judgment in favor of the Government. The key contentions of the District are: that Petitioner (as a non-vendor) has no standing to seek a refund of this particular kind of tax; that the request for the refund is facially defective because it was not initially submitted under oath; and that the taxpayer's failure to produce a DFR "resale" exemption certificate at the time of each sale precludes any refund as a matter of law.

This Court has parsed all relevant statutes and applicable case law, from both the District of Columbia and from Maryland. This is a case of first impression, and the Court herein has attempted to afford the Government a degree of deference as to how it administers its own statute. However, in light of due process considerations and instructive common law from Maryland, this Court is constrained to rule in favor of the taxpayer on all issues.

Based upon the undisputed material facts of record and based upon applicable law, this Court concludes that the taxpayer's Motion for Summary Judgment must be granted. The only lingering issue is the exact calculation of the judgment for the refund, which can be addressed through Rule 14 of the Superior Court Tax Rules.

I. SUMMARY OF RULINGS

A. The taxpayer does have standing to sue for a refund of these sales taxes, because the Code plainly

provides that the person who is entitled to demand a refund is the person "upon whom such tax was imposed and who has actually paid the tax." D.C. Code section 47- 2020(a) (1997). The utilities were merely pass-through agents for purposes of collecting the tax. For a variety of reasons, forcing a taxpayer to rely upon a vendor to avenge that taxpayer's interest in the refund process would constitute a denial of due process.

The "pass through" tax payment system is no more than an accommodation to the Government's operational interests and is not dispositive on the question of who suffered the loss due to the obligation to pay the erroneous tax. No utility vendor has suffered a loss that is attributable to submitting the taxes to the District.

B. The supplementation of the original Request for Refund with a separately submitted oath was sufficient to satisfy the requirement that the request for refund be made under oath. The District is estopped from complaining about the supplementation because it did not cite the original, inadvertent omission of the oath as the basis for denying the refund. In any event, supplementation of a request for refund is not prohibited by any applicable law.

To the extent that the lack of an oath was cured without any protest, comment or rejection by the District, such curative measures would only serve to modify the window of time that would be covered by the refund. In other words, entitlement to a refund would be calculated from the date of the filing of the OATH, not the date of submission of the original request. This conclusion, of course, is only relevant where the taxpayer is otherwise entitled to a refund.

C. Based primarily upon the Maryland appellate ruling in F.& M. Schaefer Brewing Co. v. Comptroller of the Treasury, 257 A.2d 416 (Md. 1969), (hereinafter "Schaefer") , this taxpayer's statutory exemption alone (without a pre-sale certificate) is sufficient to entitle it to a refund. This principle must apply where, as here, the Government does not dispute that the utility power for which the taxes were collected was indeed used for the tax-exempt purpose. For this reason, the

ruling herein is limited to the undisputed material facts in this particular case.

The nature of this taxpayer's business and its statutory exemption sets it entirely apart from taxpayers such as those who claim exemption because of their purchases for "resale." The instant litigation is virtually on all fours with the facts, statute, and regulations that were pivotal in Schaefer.

II. THE STATUTORY SCHEME OF TAXATION OF GROSS RECEIPTS

The Code requires that the District collect a gross sale tax from all vendors that are engaged in selling at retail certain goods and services. D.C. Code section 47-2002(1)(1997) .

Vendors have an affirmative duty to collect the sales tax from purchasers buying certain goods and services at retail, as well as an affirmative duty to remit those taxes to the District. D.C. Code section 47-2003(a) (1997).

The Code exempts from tax liability any sales of natural gas, oil, electricity, and solid fuel if such fuel is directly used in manufacturing tangible products. D.C. Code section 47- 2005(11) (1997). The Code provides further,

> It shall be presumed that all receipts from the sale of tangible personal property and services mentioned in this chapter ARE SUBJECT TO TAX UNTIL THE CONTRARY IS ESTABLISHED, AND THE BURDEN OF PROVING A RECEIPT IS NOT TAXABLE HEREUNDER SHALL BE UPON THE VENDOR OR PURCHASER AS THE CASE MAY BE. Except as provided in 47-2005(3), unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchase [sic] and the number of his registration certificate TO THE EFFECT THAT THE PROPERTY OR SERVICE WAS PURCHASED FOR RESALE, the receipts

> from all sales shall be deemed taxable. THE CERTIFICATE HEREIN REQUIRED SHALL BE IN THE FORM THE MAYOR SHALL PRESCRIBE AND, IN CASE NO CERTIFICATE IS FURNISHED OR OBTAINED PRIOR TO THE TIME THE SALE IS CONSUMMATED, THE TAX SHALL APPLY AS IF THE SALE WERE MADE AT RETAIL [emphasis supplied].

D.C. Code section 47-2010 (1997). Note that Section 2005(3) refers to sales "to semipublic institutions."[2] Here, this is not relevant.

The applicable regulations clearly require that a vendor must collect a sales tax even from "entities claiming exempt status ... unless the vendor is presented with an exemption certificate." 9 DCMR section 417.8 (1969).

The refund statute provides in pertinent part:

> Any tax that has been erroneously or illegally collected shall be refunded if application under oath is filed with the Mayor for such refund within 3 years from the payment thereof.... Such application may be made by THE PERSON UPON WHOM SUCH TAX WAS IMPOSED AND WHO HAS ACTUALLY PAID THE TAX. WHEN an application is made by a vendor who has collected reimbursement of such tax, no actual refund of monies shall be made to such vendor, until he shall first establish to the satisfaction of the Mayor, under such regulations as the Mayor may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made.

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[2] Passages of this quoted language are highlighted because of their importance to the arguments of the parties herein.

D.C. Code section 47-2020(a) [emphasis supplied].

III. FACTS NOT IN DISPUTE

The following material facts are not in dispute between the taxpayer and the District.

The taxpayer herein purchased utilities for direct use in its manufacturing of asphalt. None of these purchases were for "resale" of any kind.

The District issued to the Petitioner on August 31, 1995 a tax exemption certificate with an effective date also of August 31, 1995. The document is titled, "Certificate of Specific Exemption." It does not bear any reference to "resale" and does not purport to be a "resale certificate." It is undisputed that the Petitioner did NOT possess any exemption certificate on any of the dates for which a refund was denied and which is the subject of this appeal.

The claim for refund was submitted to the District of Columbia in a letter of September 18, 1996. In a follow-up letter of October 22, 1996, counsel for the taxpayer noted that he had inadvertently failed to file the request for refund "under oath," but that he was submitting therewith the appropriate oath. He added, "Because of this inadvertent oversight, we will wait an additional thirty (30) day period for your response. Failing a response, we will at that time presume that you have denied our application and file our further appeal in the Superior Court."

In a letter issued on October 23, 1996, the Department of Finance and Revenue denied the claim for refund, based upon two reasons: (1) that only the vendor (the utility PEPCO), not the taxpayer, could request a refund; and (2) that the sales tax exemption certificate that was issued effective August 31, 1995 "is not retroactive." The reference to the certificate was mentioned in further explaining why the Department did not expect to see PEPCO apply for a refund on behalf of the taxpayer. This letter was signed on behalf of the Department by Mark I. Gripentrog, then the Acting Associate Director.

Recalling the initial, inadvertent omission of the oath from the taxpayer, the record reflects that the District did not raise this as a basis for denying the request for refund. The Court recognizes that the District's response letter came only one day after the mailing of the oath. However, the District did subsequently contact the taxpayer to reiterate the denial of the request for refund.

In a letter issued on December 23, 1996, Mr. Gripentrog noted that the taxpayer had contacted the Mayor in a further effort to obtain a refund. The Acting Associate Director stated:

> As previously stated to you in our letter dated October 23, 1996, District Paving Corporation ("DPC") can not file the refund claim because it is not considered a vendor for collecting the sale tax and paid to the District of Columbia. DPC has no appeal rights regarding this matter and can not file a petition with the D.C. Superior Court.

He further wrote: "Mr. Kerwin spoke to you several times in the past regarding this matter. He also advised you that the sales tax exemption on manufacturing, assembling, processing or refining is not retroactive."

Letter from Gripentrog to Petitioner dated December 23, 1996.

Nothing further was included or cited in this letter as the basis for denial of the request for refund. Nothing was stated about the oath, either as to its original absence or its later submission. It is evident, then, that the claim for refund was not denied because it had been submitted originally without being under oath.

In an attempt to comply with this rejection letter, the taxpayer submitted a further letter to PEPCO, asking the utility to demand a refund on its behalf or to permit the taxpayer to sue the District in the name of PEPCO as a petitioner. This letter of March 6, 1996 was sent by

Christopher M. Kerns, and is appended as part of Exhibit 4 to the Motion for Summary Judgment.

PEPCO refused all of these requests, in a letter of March 26, 1996 signed by John J. Sullivan, the Associate General Counsel. In his letter, he wrote that PEPCO agreed with the taxpayer that District Paving had standing to pursue its own claim for refund, but that PEPCO in any event would not participate in any such claim. He stated, "Insofar as it is our position that District Paving may pursue its refund claim without PEPCO's participation, we are not inclined to participate with District Paving as a party to the process." This letter is found in the record as an attachment to the "Opposition of Petitioner to Respondent's Cross-Motion for Summary Judgment and Reply of Petitioner to Respondent's Opposition to Petitioner's Motion for Summary Judgment."

It is undisputed that Washington Gas never responded at all to a similar request from the taxpayer. This request for help was embodied in a letter of March 6, 1996 to John Jay Keane, Jr., Esq., Vice President and General Counsel of Washington Gas. A copy of this letter is appended as part of Exhibit 4 to the Motion for Summary Judgment.

IV. DISPOSITION OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. THE STANDING ISSUE.

The taxpayer has standing to file the instant Superior Court petition, as well as standing to seek a refund at the agency level. This principle is elucidated in two ways.

1. STATUTORY INTERPRETATION.

First, the Code itself provides that an application for refund "may be made" by the "person against whom such tax was imposed and who has actually paid the tax." D.C. Code section 47-2020 (1997). Without question, this is the taxpayer herein.

The vendor (any utility herein) certainly was not the person who "actually" paid the tax, because the vendor is nothing more than a mere collection agent. The reference to the person "who actually paid the tax" is a common sense

reference to the person who suffered the financial loss. The money collected for the tax was a financial loss to the purchaser of the utility power, but not a loss to the utility company.

The Court recognizes parenthetically, as neither party appears to do in this case, that the Code provides that vendors are equally entitled to seek refunds. The Code speaks SEPARATELY as to those who "actually" pay the tax and those who collect such tax. Section 2020(a) contains the second provision that "when" a vendor is the entity that seeks a refund, no refund will be made until the vendor can prove that he, she or it has already reimbursed the affected taxpayer. The use of the term "when" means that there may be occasions on which the vendor is not in fact the entity or person who will be seeking the refund.

This alternative reference to vendors as persons who can seek refunds would be totally superfluous if the only person entitled to do so was the vendor. In that event, the Code would simply state that only a vendor can apply for a refund, and there would be no need to refer to those "upon whom such tax was imposed and who has actually paid the tax." If anything, this Court interprets Section 2020(a) to underscore (not obfuscate) the fact that individuals who pay sales taxes do indeed have the right to appeal the collection of sales taxes. This is not a close question.[3]

Although the District has tendered very cogent and logical reasons as to why vendors, rather than purchasers, are charged with the responsibility of COLLECTING sales

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[3] The provision for the option of a vendor to seek a refund of taxes paid by a customer is not difficult to understand. There may be situations in which sales taxes are erroneously collected from a purchaser who is unquestionably exempt, where the collection was made through the personal negligence of a vendor's employee. In that event, a large corporate vendor might determine that good customer relations would justify reimbursing the client immediately and seeking a refund at the vendor's own expense. Thus, allowing (but not requiring) vendors to seek refunds is a reasonable option enacted by the legislature.

taxes, the District has never offered any rationale to explain why individual purchasers should be barred from pursuing their own refunds.

For example, the District refers to the vast multitudes of persons and entities who make purchases of all types of goods and services. Surely, it would be impossible for the Government to effectively collect gross receipts taxes by having to chase down members of the general public or myriad individual businesses.[4] By contrast, however, the District has never proffered that this type of catastrophic numerosity problem actually exists at the opposite end of the taxation process, i.e. requests for refund and pursuit of court appeals. There, the taxpayer (not the Government) is the only protagonist. In these kinds of tax appeals, the District will always be dealing with a discrete party opponent (not a proverbial cast of thousands).

The District has never claimed that it would be prejudiced by having to respond to requests for refunds of sales taxes simply because the requester is the affected taxpayer. The Court independently does not discern that there is any such prejudice.

At oral argument, this Court asked the District whether it was aware of any District vendor that had ever sought a refund for any purchaser. Counsel for the District knew of none. Moreover, the District has not cited proof that any jurisdiction in the United States precludes taxpayers from pursuing refunds of their own sales taxes.

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[4] The District has correctly pointed out: "The purpose of the laws is to streamline the procedures involved in the payment to and collection from vendors of sales taxes.... This eliminates the potential nightmare of dealing individually with each purchaser, and places the responsibility on each vendor." Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Summary Judgment, at 2. Clearly, this rationale applies to the collections process, but not to the refund process (where the taxpayers individually must approach the District rather than the District pursuing hundreds of thousands of taxpayers).

2. DUE PROCESS CONSIDERATIONS.

Secondly, purely as a matter of due process, it would be unconstitutional to require that taxpayers rely upon vendors in order to pursue their right to a refund for illegally collected taxes. The District has not addressed the due process issue, even though the Petitioner has amply highlighted how due process is comprised [sic] by the District's approach.

The principles of due process, as they apply to taxation, are very straightforward. Due process is a matter of having clear and reliable access to justice, an avenue of redress against the Government.

It is a basic tenet of procedural due process (under the Fifth Amendment) that property cannot be taken from a citizen by the Government without just compensation. See United States v. Reynolds, 397 U.S. 14, 15-16 (1970) ; Sittenfeld v. Tobriner, 148 U.S.App.D.C. 113, 115 , 459 F.2d 1137, 1139 (1972) .

Furthermore, Fifth Amendment rights apply to the Government's taking of personal property as well as land. See, e.g., Haldeman v. Freeman, 558 F.Supp. 514, 518 n.11 (D.D.C. 1983) (taking of documents). Money is certainly personal property. For these reasons, the taking of money through taxation always implicates the right to due process of law. This is fundamental to any scheme of taxation.

For a host of practical reasons, vendors are ã totally unreliable avenue of redress against the Government. For example, since they are not the real parties in interest, they have absolutely no impetus to voluntarily spend their own time and resources to represent customers. Here, PEPCO flatly refused to do so, and Washington Gas assertedly would not even condescend to respond at all to the taxpayer's request for help.[5]

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[5] The Petitioner's assertion to this effect has never been challenged by the District.

Since the Code does not require vendors to pursue tax refunds (even though this is permitted), a taxpayer would not have a legally cognizable cause of action against any vendor that refuses to seek a refund on its behalf.[6] Even though the Code explicitly burdens vendors with the obligation to collect the tax, the Code creates no concomitant duty to pursue refunds or appeals.

In addition, vendors would have a built-in conflict of interest in pursuing appeals or demanding refunds because vendors are compensated by the District for serving as collection agents.

Furthermore, the District's position is predicated on the assumption that the same vendor that collected the disputed tax would still be in existence at a time when the taxpayer would want to demand a refund. There is no factual basis for making such a broad presumption.

Vendors come and go. Vendors, both large and small, sometimes declare bankruptcy or go out of business for legitimate reasons. All vendors do not necessarily continue to exist in perpetuity, and they all do not necessarily leave a successor in interest, with the resources to finance potentially thousands of tax appeals. Thus, an entity that stands in the shoes of the taxpayer (under the District's argument) may disappear in a serendipitous way. This is surely a threat to due process. Under the District's theory, the personal generosity and financial fate of a vendor is the keystone to a taxpayer's ability to seek redress of its grievance against the tax authority. This is utterly intolerable from a due process standpoint.

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[6] Interestingly, it is not clear that the utility companies are aware of this litigation, even though they were on notice of the taxpayer's initial efforts to obtain refunds at the agency level. No vendor has sought to participate as an intervenor or as amicus curiae. They may be unaware that the District is touting them as the salvation for customers who desire to obtain refunds of sales taxes.

Other problems abound as well. Under the District's theory of vendor-dependence for refunds and appeals, taxpayers would suffer at the whim of vendors who make mistakes, such as those lawyers who commit malpractice, or who would not necessarily exercise good judgment in pursuing cases or settling them. This putative web of dependence upon vendors as forced fiduciaries and tax avengers is untenable as a matter of law.

The instant case portrays a classic example of a taxpayer left in the lurch because of the unwillingness of two vendors to have any connection to a tax appeal or to request a refund. The District has never explained why the right of any taxpayer to seek redress against the government should be forestalled in this capricious manner.

For all of the reasons set forth herein, there is no doubt that taxpayers do have standing to seek refunds from the District and to resort to the courts when such requests are denied.

B. THE SUPPLEMENTATION OF THE OATH.

The taxpayer does not dispute that a request for refund must be made under oath. The District argues that since the original request was not made under oath, the taxpayer is entitled to no relief whatsoever, regardless of other arguments and contentions.

The record is clear that the taxpayer realized its inadvertent error in not providing an oath in its original letter requesting a refund. That omission was remedied in a subsequent mailing to the District. It is a fact that the DFR never rejected the request for a refund based upon the oath issue at all. Since the District cites no legal authority that precludes supplementation or amendment of initial requests for refunds, the District is estopped from complaining now about the supplementation.

C. THE CERTIFICATE ISSUE.

The taxpayer contends that the refund issue concerns only the question of whether District Paving was operating

within its statutory exemption at the time of these prior purchases.

The unique issue in the instant case is that the Code's references to certificates relates only to certificates that denote purchases that are for "resale." In other words, the only exempt sales for which a pre-sale certificate is clearly required are those that relate to purchases from wholesalers who provide goods destined to be sold once again at retail prices.

The Code does not expressly speak to the requirement of re-sale certificates for purchases that can be determined to be exempt for purposes of their "end use," e.g. manufacturing.

The District argues that Petitioner herein is not entitled to a refund because of a municipal regulation that assertedly required District Paving to present an exemption certificate for each and every sale for which it now seeks a refund.

From two different standpoints, the taxpayer herein is entitled to summary judgment.

This Court will address herein as follows (1) the common law basis for rejecting the District's argument and (2) the correct application of the regulation upon which the District relies.

1. COMMON LAW AUTHORITY.

In the District of Columbia, there are no judicial opinions of any kind (from local or federal courts) that are dispositive or even relevant. For this reason, the Court looks to the common law of Maryland for legal principles and analysis that would be instructive. "Maryland, the source of the District's common law [is] an especially persuasive authority when the District's common law is silent." Napoleon v. Heard, 455 A. 2d 901, 903 (D.C. 1983) ; see Hull v. Eaton Corp., 263 U.S.App.D.C. 311, 316-17 , 825 F.2d 448, 453-54 (1987) . While the taxpayer relies on Maryland law, the District has not proffered any competing or distinguishable case law from any other state.

In the instant litigation, the common law of Maryland addresses the exemption issues at hand very precisely. In fact, the relevant Code provisions in Maryland are identical to those of the District of Columbia. In interpreting its Code and the related regulations (that are also nearly identical to ours), the highest court of Maryland has provided a logical road map for resolving this case.

The appellate decision that guides this Court is the decision in F.& M. Schaefer Brewing Co. v. Comptroller of the Treasury, supra. In this opinion, the highest court of Maryland convincingly rejects the same position argued by the District to this Court. The analogous nature of the litigation therein requires detailed analysis as follows.

The taxpayer in Schaefer had purchased electricity in the years 1964, 1965, and 1966 on which it paid sales taxes totaling $10,686.91. The taxpayer (not the vendor) demanded a refund and this request was denied by the Comptroller.[7] The denial was affirmed by the Maryland Tax Court and the Baltimore City Court. The facts in Schaefer demonstrated the following:

> Of the electricity so purchased, 94.9% was used for manufacturing and processing beer at Schaefer's Baltimore plant. The remaining 5.1% was used for nonmanufacturing purposes. During this period Schaefer did not hold an exemption certificate issued by the Comptroller pursuant to the Comptroller's Rule 24(d), nor did its utility hold a resale certificate from Schaefer.

Id. at 416.

The Maryland statute that was in effect at the time, Section 333 of Article 81 (1965), provided in pertinent part as follows:

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[7] In Schaefer, there was no contention that the taxpayer had no standing to seek a refund or to litigate the denial of a refund.

> It shall be presumed that all sales of tangible personal property and services mentioned in this subtitle are subject to tax until the contrary is established, and the burden of proving that a sale is not taxable hereunder shall be upon the vendor or the purchaser as the case may be. Unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate TO THE EFFECT THAT THE PROPERTY OR SERVICE WAS PURCHASED FOR RESALE, the sale shall be deemed a taxable sale at retail. The certificate herein required shall be in such form as the Comptroller shall, by regulation, prescribe and in case no certificate is furnished or obtained prior to the time the same is consummated, the tax shall apply as if the sale were made at retail.

Id. at 417.

The language quoted above is virtually identical to the corresponding portion of the District of Columbia Code, D.C. Code section 47-2010 (1997).[8]

The Court of Appeals of Maryland examined other relevant parts of its Code that are also the same as the corresponding sections of the District of Columbia Code. The Court in Schaefer considered the role of the Comptroller's Rule 24, which was promulgated to deal with the exemption of purchases of utilities, oil and coal.

The Comptroller's Rule 24 exempts from sales tax the purchase of any "electricity consumed in manufacturing for

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[8] The only differences are minor matters of punctuation, as well as the District of Columbia Code's references to "receipts from the sale of tangible personal property," instead of referring to "sales" of such property. These differences are meaningless.

operating machinery, lighting and heating a factory or shop." Id. at 419. Rule 24(d) provides:

> Exemption Certificate: Every purchaser purchasing natural or artificial gas electricity or steam for any purpose claimed to be exempt from or not subject to tax, in order to qualify for the exemption, must present evidence satisfactory to the Comptroller that the sale is exempt under the foregoing rules and must obtain from the Comptroller an Exemption Certificate to be presented to his Vendor.

Id. This "Rule" is identical to a District of Columbia Municipal Regulation on which the District relies: 9 DCMR section 444.10 (1996).

In Schaefer, the Comptroller argued that Rule 24(d) should be interpreted to mean that a "resale" certificate is required by those who purchase exempt utility service used in manufacturing, where the issue of "resale" is not relevant. In other words, the Comptroller argued that a "resale certificate" should be interpreted to mean (generically) any certificate of exemption from sale tax. The Office of Corporation Counsel in the instant case has made the very same argument with respect to the analogous D.C. regulation, i.e. 9 DCMR 444.10 .

The Comptroller's interpretation of the certificate requirement was squarely rejected by the Court of Appeals of Maryland, concluding that the statute was not ambiguous as to its exclusive reference to "resale" certificates. Schaefer, supra, at 419.

In other words, the Maryland Court of Appeals refused to apply and rely upon a mere rule to create new law in place of statutory language that was never enacted. This Court must do the same. Doing otherwise would have been improper under both Maryland law and the law of the District of Columbia, where principles of statutory interpretation are applied. A regulation cannot neutralize or

change a statute that is unambiguous. See Comptroller of the Treasury v. American Cyanamid, 214 A. 2d 596, 604 (Md. 1965) . The District of Columbia Court of Appeals likewise has observed that although an agency's interpretation of a statute that it must execute should be given considerable deference, interpretation that is inconsistent with the statute must be rejected by the courts. Cooper v. District of Columbia Dept. of Employment Services, 588 A.2d 1172, 1175 (D.C. 1991) .

The District of Columbia Code, like that of Maryland, is not ambiguous on the issue at hand, i.e. taxpayers such as District Paving and Schaefer Brewing Company are simply not to be taxed on the purchase of utility power for use in their manufacturing. No agency rule or bureaucratic practice can alter this principle.[9]

The Maryland Court of Appeals set forth more precisely why it is that there is no need for a "resale" certificate in order for a utility to figure out if its power is being purchased for manufacturing and that it is, thus, exempt from taxation to the customer. The Court relied expressly upon the unique nature of how the utility industry operates as a vendor. It stated:

> In providing electrical service in an amount sufficient for payment of sales tax averaging more than $3500.00 per year, as in this case, an electric utility would be obliged to know something of the operation involved and the demands to be made on it. Likewise, a utility selling for resale must have some

[9] As the United States Court of Appeals for the District of Columbia Circuit has stated, where a statute's language and history indicate clear congressional intent, courts need not ever reach the issue of extent of deference to be accorded to the agency's interpretation of the statute, even if the agency interpretation is contrary to the court's interpretation. Transbrasil. S.A. Linhas Aereas v. Dept. of Transportation, 253 U.S.App.D.C. 31, 35-36 , 791 F.2d 202, 206-07 (1985) .

> knowledge of demand in order to arrange its own generating capacity. A wholesaler of some commodities might or might not know whether a purchaser intended to resell, but the utility here certainly had knowledge from the nature of the demand that no resale was involved. Accordingly, it would have been prohibited under section 333A form accepting a resale certificate.

Id. at 418. Clearly, a utility would very well know whether an entity such as District Paving was seriously trying to re-sell the same electric power that it purchased.

The logic of the above-quoted passage from Schaefer is inescapable. This Court adopts it in principle and applies it herein.

As a practical matter, the Maryland court realistically recognized that there is no way for a purchaser to obtain non-exempt electrical power without the utility itself knowing about it independently AND being simultaneously liable to the Government to remit any taxes that are due.[10] This Court similarly looks to the practical facts that are evident here.[11]

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[10] The Maryland court made an informative comparison between Schaefer Brewing Co. and the vendor in the case of Comptroller of the Treasury v. Atlas General Industries, 198 A.2d 86 (Md. 1964) . In Atlas, the purchaser was in the business of manufacturing baskets and crates for packaging vegetables, poultry, and other food. Id. at 87. The vendor in Atlas was in no position to know or ferret out exactly what any customer was doing with generic products such as packaging. Resales may or may not have been what was involved. Schaefer, supra, at 418. The appellate court in Atlas concluded that a pre-sale exemption certificate was necessary and that the absence of one was a legitimate basis for denying a refund. This ruling was expressly made, however, on the basis of the nature of the business that was involved — and the fact that "resale" was clearly a disputed issue. This is not the case in the instant tax appeal.

[11] In its pleading, the District has briefly suggested that a "resale certificate" is the same document that is issued for all tax- exempt entities. However, this record does not contain facts that sufficiently prove this to be true. The District has failed to demonstrate that this phrase actually denotes a solitary certificate that is used for multiple

This Court must recognize that the public utility industry operates based upon massive distribution capability. All utilities presumably know perfectly well who can actually distribute power and who cannot. Moreover, no utility company would sell its power to another entity that is capable of making redistribution of power without doing so purposely and with full knowledge of the intent of the purchaser. It defies belief to suggest that a non-utility can re-sell electric power or natural gas accidentally or surreptitiously.

The practical purpose of issuing exemption certificates (whether they are labelled "resale" certificates or anything else) is to establish a convenient way of forestalling fraud against the District. Here, the realities of how a utility company markets its commodity serve as the Government's shield against fraud. This is inherently why the lack of an exemption certificate for past utility power purchases is of no significance in the refund process.

2. REGULATORY ANALYSIS.

While this Court adopts the same analysis employed in Schaefer, the proverbial bottom line remains: neither the Regulations nor the District of Columbia Code limits refunds on statutorily exempt utility purchases to those discrete sales for which a "resale" or any other exemption certificate had been presented at the time of the purchase.

Irrespective of the analysis in Schaefer, there is another reason why the District cannot prevail in this tax appeal.

It is critical to note that the regulation upon which the District relies does not apply to the instant Petitioner. An

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purposes. This is not merely a matter of semantics. In fact, the record herein contains copies of the exemption certificates that were eventually issued to the Petitioner. Those documents are facially entitled, "Certificate of Specific Exemption." They contain no reference whatsoever to "resale." The Petitioner herein has never held a so-called "resale" certificate. This is a phantom issue.

existing regulation already forbids the District from collecting sales taxes from entities such as District Paving — without regard to pre-sale presentation of any certificate. A careful analysis of that regulation is instructive. The regulation emphasized by the District, 9 DCMR 444.10, states:

> EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, each purchaser of natural or artificial gas, oil, electricity, solid fuel, or steam for any purpose claiming to be exempt from or not subject to the tax, in order to qualify for the exemption, must present evidence satisfactory to the Director that the sale is exempt under the Act and this section, and must obtain from the Director a specific exemption to be presented to the vendor.

The key language that robs this regulation of any controlling impact is the phrase, "[e]xcept as otherwise provided in this section." This phrase means that Section 444.10 must be read in the total context of every other provision of Title 9.

The District fails to acknowledge that on the very same page in the Municipal Regulations, a closely preceding regulation does indeed "otherwise provide" for the exemption from taxation of this Petitioner. Specifically, 9 DCMR 444.7 states: "The tax shall not apply to the receipts from any of the types of sales exempted under D.C. Code section 47-2005 (1990 Repl. Vol.)." This regulation is a stark and unmistakable admonition to the agency not to apply the gross receipts tax to the very types of sales at issue herein, i.e. sales of "natural or artificial gas, oil, electricity, solid fuel, or steam, directly used in manufacturing, assembling, processing, or refining." D.C. Code section 47-2005(11) . Nothing could be clearer. This regulation conforms precisely with the Code.

Since Section 444.7 of Title 9 directly applies to the Petitioner and tersely instructs the Department not to apply

the tax, the District's reliance upon Section 444.10 is totally misplaced. Upon reflection, Section 444.10 has no connection to the instant case because, by its own terms, it covers only those sales of utility power that are NOT reached by any specific statutory exemption. This regulation, in context, is nothing more than a catch-all provision. This Petitioner's purchases do not fall into that vague category.

In combination, the ruling in Schaefer and the application of Section 444.7 are a powerful basis upon which to grant relief to the Petitioner. This is not a close question.

This Court concludes only that if a taxpayer whose purchases of utility power are statutorily exempt demands a refund, such refund cannot be denied on the basis of lack of presentation of an exemption certificate or "resale" certificate at the time of the prior purchase. The denial of refund cannot be predicated upon such a piece of paper itself. However, the District may always do in the future what it did NOT do in the instant case, i.e. demand that the taxpayer prove substantively that it was a ctually engaged in manufacturing tangible products as of the dates of the prior purchases for which a refund is sought.[12] This would be a totally legitimate inquiry by DFR when the nature of the taxpayer's business activity is not already known to the Department.

In the instant case, the District expressed no interest in demanding factual proof of Petitioner's past manufacturing activities and would not even engage the Petitioner in such a challenge. The Court infers that this occurred because the Department was so wedded to the notion that the taxpayer had no standing to seek a refund at all. Raising a demand for proof of past manufacturing of tangible goods would have been an admission that the taxpayer had standing to seek a refund.

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[12] For an established manufacturing business, proving past entitlement to the statutory exemption should be simple, and facts can be easily corroborated by the utility-vendor.

The burden of proving past entitlement to a statutory exemption will always rest upon the taxpayer. Consequently, the District may treat requests for refunds by demanding factual proof of the nature of the taxpayer's business operations if the taxpayer has no appropriate certificate to verify the relevant period of exemption.[13] Hence, it behooves taxpayers such as District Paving to scrupulously acquire exemption certificates to avoid costly factual presentations at the agency level when requesting refunds.

For all of the reasons set forth herein above, as to statutory interpretation, application of municipal regulations, and recognition of pertinent common law, the District cannot prevail.

WHEREFORE, it is by the Court this 22nd day of April, 1999

ORDERED that the Petitioner's Motion for Summary Judgment is granted; and it is

FURTHER ORDERED that the Respondent's Cross-Motion for Summary Judgment is hereby denied; and it is

FURTHER ORDERED that the Petitioner is entitled to a refund of taxes paid on purchases of gas and electricity for the three-year period following the date of October 22, 1996; and it is

FURTHER ORDERED that Petitioner shall file within 30 days hereof a Motion for Entry of Judgment as to the precise amount of the judgment, with provision for interest at the statutory rate until paid.

Cheryl M. Long Judge

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[13] In some cases, the name of the corporate taxpayers may not readily reveal the nature of its business.

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APPENDIX H

SUMMARY OF STATES' TREATMENT OF DIRECT REFUND FILING BY PURCHASERS

State	Purchaser able to independently file refund directly with State?	Authority
AL	Yes	*Dandy's Discount Package Store Inc., v. James M. Sizemore, Jr., et al.*, 597 So. 2d 1370 (1992).
AK	N/A	No general state sales tax.
AZ	No	Trans. Priv. Tax Proc. 01-1, 9/27/01.
AR	Yes	Ark. Code. Ann. § 26-18-507(d).
CA	No	Sales Tax Counsel Rul. § 465.0062.
CO	No	Colo. Rev. Stat. § 39-26-102(22).
CT	No	Policy Statement 98(5), 10/21/98.
DE	N/A	No general state sales tax.
DC	Yes	D.C. Code Ann. § 47-2020.
FL	No	*Dept. of Rev. v. Daystar Farms Inc.*, 803 So. 2d 892 (2002).
GA	Yes	Ga. Code Ann. § 48-1-2(25).
HI	No	Haw. Rev. Stat. § 237-13.
ID	Yes*	Idaho Admin. Rules § 35.01.02.117.02.
IL	No	Gen. Info. Ltr. ST-00-0050-GIL, 3/20/00.
*	But only if the vendor refuses or is unable to do so.	
**	Very limited exceptions exist.	

State	Purchaser able to independently file refund directly with State?	Authority
IN	Yes	Ind. Code. § 6-2.5-6-13.
IA	Yes	Iowa Admin. Code § 701-12.9.
KS	Yes*	Kan. Stat. Ann. § 79-3650.
KY	No	Ky. Rev. Stat. Ann. § 139.770(3).
LA	Yes	*Krauss Company, Ltd. v. Robert Develle, et al.*, 110 So. 2d 104, (1959).
ME	No	Me. Rev. Stat. Ann. § 1814(3).
MD	No**	Md. Code Ann. § 13-901(a) and (g).
MA	No	*Mobil Oil Corp v. Comm'r of Rev.*, F239392 (2000).
MI	Yes	*Nat'l Bank of Detroit v. Dept. of Rev.*, 54 N.W.2d 278 (1952).
MN	Yes	Minn. Stat. § 289A.50(2a).
MS	Yes	*Monaghan v. Seismograph Service Corp.*, 108 So. 2d 721 (1959).
MO	No	*Galamet, Inc. v. Dir. of Rev.*, 915 S.W.2d 331 (1996).
MT	N/A	No general state sales tax.
NE	Yes	Neb. Rev. Stat. § 77-2708(2)(a).
NV	Yes	Nev. Att'y Gen. Op. No. 89-11.
NH	N/A	No general state sales tax.
NJ	Yes	N.J. Admin. Code. § 18:2-5.8(d)(2).
*	But only if the vendor refuses or is unable to do so.	
**	Very limited exceptions exist.	

State	Purchaser able to independently file refund directly with State?	Authority
NM	No	N.M. Tax. and Rev. Dept. Rul. 440-95-01.
NY	Yes	N.Y. Tax Law § 1139; NYCRR § 534.8.
NC	Yes	*See* N.C. Gen. Stat. § 105-164.14.
ND	No**	N.D. Admin. Code § 81-04.1-03-14.
OH	Yes*	Ohio Rev. Code Ann. § 5739.07(B).
OK	No**	Okla. Stat. tit. 68 §§ 1357.4(D), 1359.1(E), 54004(E)
OR	N/A	No general state sales tax.
PA	Yes	*See Silberman and Larkin v. Pennsylvania,* 738 A.2d 508 (1999).
RI	Yes	*See* Rhode Island Rul. Request 97-08.
SC	No**	*See* South Carolina Rev. Rul. 96-9, 7/1/96.
SD	No	*In re Appeals of Midland Ventures, Inc.,* 325 N.W.2d 300 (1982).
TN	No	*Reimann and Woodson Tenent Laboratories, Inc. v. Huddleston,* 883 S.W.3d 135 (1993).
TX	Yes	Tex. Tax Code Ann. § 111.104.
*	But only if the vendor refuses or is unable to do so.	
**	Very limited exceptions exist.	

State	Purchaser able to independently file refund directly with State?	Authority
UT	Yes	*Greater Park City Company v. Tax Commission*, 954 P.2d 873 (1998).
VT	Yes	Vt. Stat. Ann. tit. 32 § 9781(a).
VA	Yes	Va. Admin. Code § 10-20-160(C)(3).
WA	Yes*	Wash. Admin. Code § 458-20-229(3)(b)(ii).
WV	Yes	W. Va. Code § 11-15-9(b).
WI	Yes	Wis. Stat. § 77.59(4)(a).
WY	No**	Wyo. Rules Dept. Rev. § 9(a).
*	But only if the vendor refuses or is unable to do so.	
**	Very limited exceptions exist.	

APPENDIX I

McCaskill calls for end to corporate tax windfall – businesses don't have to return sales tax refunds to customers

St. Louis Post-Dispatch
Wednesday, May 17, 2000
Page B3

By Virginia Young

State Auditor Claire McCaskill recommended Tuesday that Missouri follow the lead of six neighboring states and eliminate a tax windfall for businesses.

Her office conducted a special review of state sales tax refunds, which have increased more than 400 percent in the last nine years – to about $47 million last year from $9 million in 1990.

Missouri law allows businesses that improperly charge consumers too much sales tax to apply for refunds and pocket the money. Overcharged consumers have no right to get their money back.

Auditors studied the 266 largest refunds last year and found that in about half the cases, there was no indication in tax files that the merchant intended to return the money to the original customers. Those cases accounted for about $21 million in refunds.

By contrast, the audit says that six of Missouri's bordering states have regulations, laws or policies which provide that refunds must be returned to the customer. They are Illinois, Arkansas, Iowa, Kansas, Nebraska and Oklahoma.

The Missouri Legislature has proved unreceptive to such legislation. In 1993, the House added the provision to four bills but the Senate refused to accept it and all four bills died. A similar effort fizzled in 1997. There was no attempt to pass such legislation in the session that ended Friday.

That means Missouri could next consider the matter in January. In cases where it is not possible to find the original customer, the audit suggests that the money be retained by the state and local government "rather than to enrich the vendors that have erroneously collected such taxes."

McCaskill undertook the review, in part, to see whether businesses were repeatedly requesting refunds instead of correcting their computers to charge the correct amount of sales tax. That hunch proved false.

Ken Kuster, director of audits, said: "There were some people who got multiple refunds, but when we looked at the specifics of those refunds, we found nothing to indicate someone had overcharged the consumer and then failed to correct their scanner."

Most of the increase in refunds last year stemmed from recent rulings exempting some country club and athletic club dues from sales taxes.